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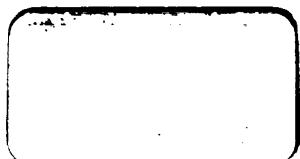
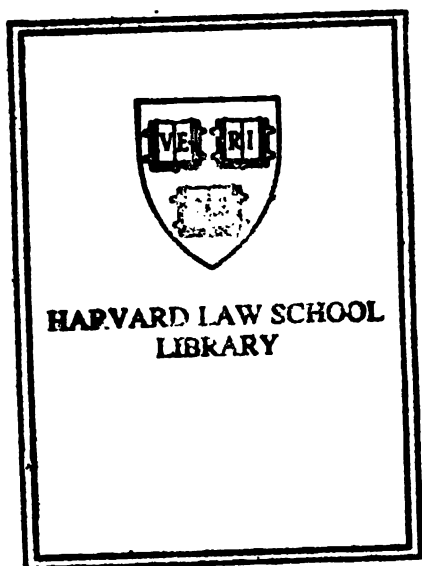
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1878.

REPORTED BY

CHAS. F. BICKNELL,
CLERK OF SUPREME COURT.

AND

HON. THOMAS P. HAWLEY,
CHIEF JUSTICE.

VOLUME XIII.

SAN FRANCISCO:

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1879.

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Rec. Aug. 6, 1879

JUSTICES OF THE SUPREME COURT.

| | |
|------------------------------|-----------------------|
| HON. THOMAS P. HAWLEY..... | CHIEF JUSTICE. |
| HON. WILLIAM H. BEATTY | } ASSOCIATE JUSTICES. |
| HON. ORVILLE R. LEONARD..... | |

OFFICERS OF THE COURT.

| | |
|----------------------------|-------------------|
| HON. JOHN R. KITTRELL..... | ATTORNEY-GENERAL. |
| CHAS. F. BICKNELL..... | CLERK. |
| S. T. SWIFT..... | BAILIFF. |

DISTRICT JUDGES OF THE STATE OF NEVADA.
1878.

| | |
|-------------------------------|-------------------------------|
| FIRST DISTRICT | HON. RICHARD RISING. |
| SECOND DISTRICT | HON. S. H. WRIGHT. |
| THIRD DISTRICT | HON. W. M. SEAWELL. |
| FOURTH DISTRICT | HON. W. S. BONNIFIELD. |
| FIFTH DISTRICT | HON. D. C. MCKENNEY. |
| SIXTH DISTRICT | HON. F. W. COLE. |
| SEVENTH DISTRICT | HON. HENRY RIVES. |
| EIGHTH DISTRICT | HON. J. S. JAMESON. |
| NINTH DISTRICT | HON. J. H. FLACK. |

TABLE OF CASES.

| | PAGE |
|---------------------------------------|---------------|
| Ashley ads. Brown..... | 251 |
| Badger M. & M. Co. ads. Johnson..... | 351 |
| Benton ads. Vesey..... | 284 |
| Berry ads. Terry..... | 514 |
| Bishop v. Stewart..... | 25 |
| Brown v. Ashley..... | 251 |
| Burbank ads. Rivers..... | 398 |
| Burbank v. West Walker R. D. Co..... | 431 |
| California M. Co. ads. State..... | 194, 203, 289 |
| Carson River W. Co. ads. Ward..... | 44 |
| Chiatovich ads. Hanson..... | 395 |
| Cohn, Ex parte..... | 424 |
| Con. Vir. M. Co. ads. State..... | 194, 228, 296 |
| Crane, Hastings & Co. v. Gloster..... | 279 |
| Davis v. Noteware..... | 421 |
| District Court ads. Martin..... | 85 |
| Duquette v. Ouilmette..... | 499 |
| Estis v. Simpson..... | 472 |
| Ex parte Cohn..... | 424 |
| Ex parte Fitzgerald..... | 302 |
| Ex parte Twohig..... | 302 |
| Ferguson v. V. & T. R. R. Co..... | 184 |
| Fensier v. District Court..... | 85 |
| Fitzgerald, Ex parte..... | 302 |
| Fuller ads. Solomon..... | 276 |
| Gaudette v. Roeder..... | 341 |
| Gilmer ads. Shafer..... | 330 |
| Gilson ads. Martens..... | 489 |
| Gleason v. Martin White M. Co..... | 442 |
| Gloster ads. Crane..... | 279 |
| Gooch v. Sullivan..... | 78 |
| Greenwell v. Nash..... | 286 |

| | PAGE |
|--------------------------------------------|------|
| Hamilton ads. State..... | 386 |
| Hampton ads. State ex rel. Arick..... | 439 |
| Hanson ads. Higgs..... | 356 |
| Hanson v. Chiatovich..... | 395 |
| Hatch ads. Shoemaker..... | 261 |
| Hawkins ads. Ward..... | 44 |
| Haynes ads. Wearne..... | 103 |
| Higgs v. Hanson..... | 356 |
| Hobart ads. State ex rel. Fox..... | 418 |
| Hoole ads. Richardson..... | 493 |
| Jameson ads. State ex rel. Burbank..... | 429 |
| Johnson v. Badger M. & M. Co..... | 351 |
| Jones v. Pacific W. L. & F. Co..... | 359 |
| Kennedy v. Schwartz..... | 229 |
| Laurie ads. State..... | 386 |
| Laveaga v. Wise..... | 296 |
| Lippman ads. Wicks..... | 499 |
| Lott ads. More..... | 376 |
| Lynch ads. V. & T. R. R. Co..... | 92 |
| Mann ads. Stevenson..... | 268 |
| Martens v. Gilson..... | 489 |
| Martin v. District Court..... | 85 |
| Martin White M. Co. ads. Gleeson..... | 442 |
| Mayberry ads. Smith..... | 427 |
| More v. Lott..... | 376 |
| Nash ads. Greenwell..... | 286 |
| Northern Belle M. & M. Co. ads. State..... | 250 |
| Noteware ads. Davis..... | 421 |
| Ouilmette ads. Duquette..... | 499 |
| Pacific W. L. & F. Co ads. Jones..... | 359 |
| Pierce v. Traver..... | 526 |
| Rice ads. Williams..... | 234 |
| Richardson v. Hoole..... | 493 |
| Rivers v. Burbank..... | 398 |
| Roeder ads. Gaudette..... | 341 |
| Rourke, Matter of..... | 253 |
| Rover ads. State..... | 17 |
| Schafer v. Gilmer..... | 330 |
| Schwartz ads. Kennedy..... | 229 |
| Shoemaker v. Hatch..... | 261 |
| Shrieves ads. Smith..... | 303 |
| Simpson ads. Estis..... | 472 |

| | PAGE |
|--------------------------------------------------|---------------|
| Smith v. Mayberry | 427 |
| Smith v. Shrieves | 303 |
| Smith v. Stewart | 65 |
| Smith ads. Swan | 257 |
| Solen v. V. T. R. R. Co. | 106 |
| Solid Silver G. & S. M. Co. v. Steel | 486 |
| Solomon v. Fuller | 276 |
| State v. California M. Co | 194, 203, 289 |
| State v. Con. Vir. M. Co. | 194, 228, 296 |
| State v. Hamilton | 386 |
| State v. Laurie | 386 |
| State v. Northern Belle M. & M. Co | 250 |
| State v. Rover | 17 |
| State v. Tickel | 502 |
| State ex rel. Arick v. Hampton | 439 |
| State ex rel. Burbank v. Jameson | 429 |
| State ex rel. Fox v. Hobart | 418 |
| Steel v. Solid Silver G. & S. M. Co. | 486 |
| Stevenson v. Mann | 268 |
| Stevenson ads. Waters | 157 |
| Stewart ads. Bishop | 25 |
| Stewart ads. Smith | 65 |
| Sullivan ads. Gooch | 78 |
| Sullivan ads. Thomas | 242 |
| Swan v. Smith | 257 |
| Sweeney ads. Thorne | 415 |
| Terry v. Berry | 514 |
| Thomas v. Sullivan | 242 |
| Thorne v. Sweeney | 415 |
| Tickle ads. State | 502 |
| Traver ads. Pierce | 526 |
| Twohig, Ex parte | 302 |
| Vesey v. Benton | 284 |
| Virginia & Truckee R. R. Co. ads. Ferguson | 184 |
| Virginia & Truckee R. R. Co. v. Lynch | 92 |
| Virginia & Truckee R. R. Co. ads. Solen | 106 |
| Ward v. Carson River W. Co. | 44 |
| Waters v. Stevenson | 157 |
| Wearne v. Haynes | 103 |
| West Walker R. D. Co. ads. Burbank | 431 |
| Wicks v. Lippman | 499 |
| Williams v. Rice | 234 |
| Wise ads. Laveaga | 296 |

RULES

OF THE

BOARD OF PARDONS.

1. The regular meetings of the board shall be held on the second Monday of January, April, July, and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the State, "approved February 20, 1875."

4. In every case where the applicant has been confined in the State prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon

any of the grounds specified in the original application, except by the consent of all the members of the board.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-general.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon or restoration of citizenship.

RULES

OF

THE SUPREME COURT

OF THE STATE OF NEVADA.

[The following rules, as amended and revised, are to take effect on the first Monday of September, 1879, and thereupon all rules heretofore made shall be abrogated.]

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this State and of the United States;
2. The constitutional relations of the State and Federal governments;
3. The jurisdiction of the various courts of this State and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;

6. The general grounds of equity jurisdiction and principles of equity jurisprudence;

7. Rules and principles of pleadings and evidence;

8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a *bona fide* resident of this State; such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) thirty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

1. If the transcript of the record be not filed within the time prescribed by Rule II, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

2. On such motion, there shall be presented the certifi-

cate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request that he has not paid the fees therefor, if the same have been demanded.

RULE IV.

1. All transcripts of record in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter, and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one-half inches in width, with a margin of not less than one and one-half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript, if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI.

The expense of printing transcripts, on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at

the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time, on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon

the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs and points and authorities, which copies shall be distributed by the clerk.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be, upon petition in writing, and presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript

for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

RULE XXIV.

In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by an order of one of the justices, the notice shall be five days.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

JANUARY TERM, 1878.

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| 13 | 17 |
| 14 | 126 |
| 16 | 215 |

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| 18 | 17 |
| 25 | 471 |

[No. 861.]

THE STATE OF NEVADA, RESPONDENT, v. J. W. ROVER, APPELLANT.

RECORD IN CRIMINAL CASE.—The record in a criminal case consists only of such matter as is required by sections 450 and 490 of the criminal practice act. (1 Comp. Laws, 2075, 2105.)

IDEM—CLERK'S FEES.—A clerk, in preparing a transcript on appeal, is only entitled to receive pay for copying such papers, documents and statements as are provided for by said sections.

POWER OF COURT TO GRANT A NEW TRIAL.—The supreme court has the power to grant a new trial in a criminal case, although not asked for by the defendant. (*State v. Rover*, 10 Nev. 388, affirmed.)

STATEMENT OF DEFENDANT ON PRELIMINARY EXAMINATION—HOW TAKEN AND WHEN ADMISSIBLE IN EVIDENCE.—The committing magistrates may select clerks to write out the testimony taken on preliminary examination; and when the provisions of the law for taking such testimony have been complied with, the statement then made by defendant is admissible in evidence against him upon the trial of the case.

PROSECUTING WITNESS—WHEN ALLOWED TO GIVE HIS REASONS FOR FILING A COMPLAINT AGAINST THE DEFENDANT.—When the defendant, on his preliminary examination, makes a statement accusing the prosecuting witness of the commission of the crime for which the defendant is afterwards indicted: Held, that the prosecuting witness may, upon the trial, give in evidence the declarations of third persons made to him prior to the filing of the complaint, for the purpose of explaining his conduct to the jury. (By Hawley, C. J.)

VOL. XIII—2.

Argument for Appellant.

ORDERS MADE ON SUNDAY—AUTHORITY OF COURT.—The provisions of the statutes of this state (1 Comp. L. 955) authorizing the court "to receive a verdict or discharge a jury" carries with it the power to have the verdict recorded, and authorizes the court to make such other orders as may be incident to the power given, such as designating a day when it would pronounce judgment upon the verdict.

REFUSAL OF AN INSTRUCTION ALREADY GIVEN IN SUBSTANCE BY THE COURT IS NOT ERROR. (*State v. O'Connor*, 11 Nev. 416, affirmed.)

INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE—MEANING OF WORDS "ABSOLUTELY INCOMPATIBLE."—The court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt:" *Held*, that the words "absolutely incompatible," as contained in the instruction, imply that the proof of defendant's guilt must be established beyond the possibility of a doubt, and for that reason the court did not err in refusing the instruction.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendant was convicted of murder in the first degree.
The facts appear in the opinion.

T. W. W. Davies, for Appellant.

I. The court erred in denying the defendants motion to be discharged on the ground of former jeopardy. (*The State v. Rover*, 10 Nev. 388; *The People v. Webb*, 38 Cal. 479; *Ex parte Maxwell*, 11 Nev. 418; cases cited in petitioner's brief: 11 Nev. 420; *O'Leary v. People*, 4 Parker Cr. 187; *State v. Brannon*, 55 Mo. 63; *State v. Pitts*, 57 Mo. 85.)

II. The court erred in admitting the paper purporting to be the statement of the defendant on his preliminary examination before the committing magistrate. (1 Comp. Laws. 1778-1786.)

III. The court erred in permitting the witness McWorthy to detail conversations and statements of other persons not under oath.

IV. The court erred in giving the instruction of its own motion concerning "provocation," and concerning "murder

Argument for Respondent.

in the second degree." (*People v. Murray*, 41 Cal. 67; Rule 4, Wills Cir. Ev. 171; Rule 2, Burrill on Cir. Ev.)

V. The recording of the verdict, asking the jury if the verdict as recorded was their verdict, fixing a time at which the time for pronouncing sentence would be set, remanding the defendant to the custody of the sheriff, and adjourning court, were all judicial acts not authorized by law to be done on Sunday, which is a non-judicial day. (*Read v. Commonwealth*, 22 Gratt. 924.)

VI. If any error intervenes in the proceedings, it is presumed to be injurious. The prisoner is entitled to stand upon his strict legal rights, and to be tried according to law. (*People v. Williams*, 18 Cal. 187; *People v. Ybarra*, 17 Id. 171.)

W. S. Bonnifield, also for Appellant.

John R. Kittrell, attorney-general, and *Wm. Cain*, for Respondent.

I. The Court did not err in admitting the statement of J. W. Rover, made before the examining magistrate. (1 Greenleaf on Ev., secs. 201, 218, 224; 1 Phillips on Ev., secs. 442, 445, 446; *State v. Lamb*, 28 Mo. 218.)

II. The court did not err in allowing the witness McWorthy to answer the question: "What caused or induced you to make the complaint that Rover had murdered Sharp?" (1 Greenleaf on Ev., sec. 218.)

III. Such evidence is not hearsay, but original and material evidence. (1 Greenleaf on Ev., sec. 100, 101; 1 Wharton Cr. Law, sec. 663; 1 Philips on Ev., sec. 139, note; Bacon's Abr., Vol. 3, 629, 630; *State v. Fox*, 25 N. J. 566; *People v. Thea*, 8 Cal. 538; *Carico v. Commonwealth*, 7 Bush. Ky. 124.)

IV. The degree of murder need not be designated in the indictment. (*People v. King*, 27 Cal. 507; *People v. Nichol*, 34 Id. 211; *State v. Huff*, 12 Nev. 140.)

V. Instruction number two asked by defendant, is erroneous. (*People v. Dick*, 32 Cal. 215; *People v. Cronin*, 34 Id. 201; *People v. Murray*, 41 Id. 67.)

Opinion of the Court—Hawley, C. J.

By the Court, HAWLEY, C. J. :

When the transcript on appeal in this case was filed in this court it contained over eight hundred pages. Upon the oral argument it was ascertained that the clerk, at the request of counsel, had, with other irrelevant matter, inserted all the testimony submitted at the trial, although not embodied in any bill of exceptions.

At the close of the argument we made an order that the transcript be returned to the clerk of Washoe county, with instructions to eliminate therefrom all matters contained therein that were not, by the provisions of sections 450 and 480 of the criminal practice act (1 Compiled Laws, 2075, 2105) made part of the record in a criminal case. It came back with only one hundred and fifteen pages, and still contains an affidavit made by T. W. W. Davies, of counsel for appellant, setting forth what is claimed to have been an irregularity upon the part of the counsel for the state in his closing argument to the jury, and the instructions given to the jury by the court of its own motion.

These ought not to have been included in the transcript, because not embodied in any bill of exceptions.

After what has been said by this court in *The State v. Forsha*, 8 Nev. 137; *State v. Burns*, 8 Id. 251; *State v. Huff*, 11 Id. 17; *State v. Larkin*, 11 Id. 314; *State v. Rover*, 11 Id. 343; *State v. Ah Mook*, 12 Id. 369; and *State v. Sam Mills*, 12 Id. 401, there is certainly no excuse in incumbering the transcript on appeal with any matter not authorized by sections 450 and 480 of the criminal practice act. If the county clerks will remember that it is their duty not to insert anything in the transcript, whether asked for by counsel or not, except as provided for by said sections, and that they are not entitled to any pay for services performed in copying papers, documents or statements that are not made any part of the record in a criminal case, they would hereafter save themselves some trouble and the counties considerable expense, to say nothing of the unnecessary task so often imposed upon this court of sifting the tare from the wheat and expelling the chaff from the transcript.

The points made by appellant's counsel, that are based upon the record, will be noticed in their regular order:

1. The question of jeopardy and the power of the court to grant a new trial, although not asked for by the defendant, is settled by the former decision in this case. (*State v. Rover*, 10 Nev. 388.)

2. The court did not err in admitting the voluntary statement of the defendant as taken down on his preliminary examination before Job Davis, a justice of the peace in Humboldt county. The justices of the peace can select clerks *ad libitum* to perform the clerical labor of writing out the testimony taken upon the preliminary examination, but must see that they correctly perform the duty. In this case the statement was written by clerks under the direction and in the presence of the justice. It was read by one of the clerks, at the request and in the presence of the justice, to the defendant. It was corrected in every particular desired by the defendant. The defendant, before making the statement, was fully advised by the justice of all his rights. In short, the record shows that sections 152, 154, 155 and 156 of the criminal practice act (1 Compiled Laws, 1780, 1782, 1783, 1784) were in every respect fully complied with. In the absence of any evidence tending to show that the witnesses were not excluded pending the examination of defendant, as provided for in section 158 (1 Compiled Laws, 1786), we cannot presume that the justice did not conform to this provision of the statute. The interlineations in the statement were satisfactorily explained and the missing portions of the certificate properly accounted for and supplied. The provisions of the law respecting the manner in which the statement of defendant may be taken having been complied with, the statement was admissible in evidence against the defendant, upon the trial of the case, under the general principles applicable to the admissibility of confessions. (1 Greenl. on Ev., secs. 216, 224; 1 Phil. on Ev., 535; 2 Id. 242; *State v. Lamb*, 28 Mo. 218; *De Foe v. People*, 22 Mich. 224; *People v. Kelley*, 47 Cal. 125.) The time of introducing the statement was optional with the counsel for the prosecution.

Opinion of the Court—Hawley, C. J.

3. The prosecuting witness, McWorthy, after testifying that he came from the camp where the homicide had been committed to Clark and Osburn's Station, and had gone from there to Mill City and to Winnemucca, where he made a complaint before a justice of the peace, accusing Rover of the murder of I. N. Sharp, was asked by counsel for the State: "What caused or induced you to make this complaint against Rover?" He answered, among other things, as follows: "By inquiries and from what Rover told me that Sharp said he was going to Wright's ranch. When I inquired for him at Osburn's ranch Mr. Clark stood there, and after Mr. Osburn saying he had not seen him, Mr. Clark he says: 'I just came from Wright's ranch, and I do not think he is there.' Mrs. Osburn then says: 'That man Rover has murdered him;' and I says: 'I guess not; he was too cowardly—wouldn't murder anything.' Mrs. Osburn says: 'It is cowards that do such things.'" The portions of this answer particularly complained of by appellant—viz: the declarations of Mrs. Osburn—were, upon motion, stricken out. It was therefore the duty of the jury to disregard them, without any special instruction from the court to that effect. Where testimony is stricken out it is, we believe, the usual custom for courts, in the trial of criminal cases, to instruct the jury to disregard the evidence, and it is perhaps the better practice, out of abundant caution, to do so; but the appellant has no cause of complaint upon this ground, unless he affirmatively shows that the court, upon request, refused to so instruct the jury. The court did not err in allowing the witness McWorthy, in answer to the question asked by counsel, to detail the efforts he had made to learn the whereabouts of the deceased. The defendant Rover, in his voluntary statement before the committing magistrate, had accused the witness McWorthy of being the murderer of Sharp, and the jury were called upon to determine, among other things, whether this accusation was true or false. The declarations of third persons were not called out by the prosecution for the purpose of being used as evidence against Rover, but were introduced simply for the purpose of explaining the conduct of the witness McWorthy,

so that the jury might determine therefrom whether he acted in good faith, or whether, being himself the real murderer, he had falsely made the charge against Rover, for the purpose of directing the attention of the public to the accused and diverting it from himself. To that extent it was proper for the witness, in detailing the steps he had taken, to state what answers were given to the inquiries made by him. (1 Greenl. on Ev., secs. 100, 101; 1 Whart. Cr. Law, sec. 663; *State v. Fox*, 25 N. J. 567.)

4. The objections urged by appellant's counsel, that the court erred in having the verdict read to the jury and recorded on Sunday, and in discharging the jury and designating a day upon which he would pronounce judgment, are wholly untenable. The statutes of this state expressly provide that the courts may be held on Sunday: "To receive a verdict or discharge a jury." (1 Compiled Laws, 955.) When the verdict is given, "the clerk must immediately record it in full on the minutes, and must read it to the jury and inquire of them whether it be their verdict." (1 Compiled Laws, 2043.) The power given to the court to sit on Sunday to receive the verdict, necessarily authorizes it to have the verdict then read and recorded, to discharge the jury, and make such other orders as are incident to the power given by the statute. (*McCorkle v. The State*; 14 Ind. 39.)

5. The court did not err in refusing to give the second instruction asked by defendant's counsel. It reads as follows: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is the fundamental rule by which the relevancy and effect of circumstantial evidence must be estimated." This instruction is copied from *Wills on Circumstantial Evidence*, 149. *Burrill* states the rule correctly, as follows: "The evidence against the accused must be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him." (*Burrill on Cir. Ev.*, 737.) He

Opinion of Beatty, J., concurring.

says the rule has been otherwise stated by Wills, and without commenting upon the difference in the language adds that this rule "is the great test rule of all presumptive proof." The court in this case was fully justified in refusing the instruction upon the authority of *The State v. O'Connor*, 11 Nev., 416 on the ground that it had already been given in substance in the second instruction asked by the prosecution (copied from *People v. Cronin*, 34 Cal. 194), and the first instruction asked by defendant (copied from *People v. Dick*, 32 Cal. 215).

The ruling ought, however, to be sustained upon broader grounds. The words "absolutely incompatible," as contained in the instruction, in their usual signification, imply that the proof of defendant's guilt must be established beyond the possibility of a doubt. This is not the law. (*State v. Ferguson*, 9 Nev. 118; *State v. Nelson*, 11 Id. 340.) "The law," as was said by the Supreme Court of California in *The People v. Murray*, "requires that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion. A higher degree of certainty in establishing the guilt of the accused, by means of circumstantial evidence, cannot be required without rendering such evidence valueless." (41 Cal. 67.)

The judgment and order overruling defendant's motion for a new trial are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

BEATTY, J., concurring:

In regard to the third point discussed in the foregoing opinion, I consider it doubtful whether the record shows satisfactorily the materiality and relevancy of the answers made to McWorthy's inquiries in regard to the deceased. But I am satisfied that if any error was committed in admitting them, it could not possibly have injured the defendant. All that those answers (aside from those that were stricken out) had any tendency to prove was that the deceased had not been seen at places away from the mining camp subsequent to the time when, according to the de-

Points decided.

defendant's own statement, he had seen him killed and buried at the camp. If the evidence was hearsay, it tended only to prove a fact conceded by defendant—that Sharp, the deceased, had not left the camp.

I concur in the judgment and in all other particulars in the opinion of the chief justice.

LEONARD, J., having been of counsel at a former trial of the above cause, did not participate in the foregoing decision.

[No. 831.]

BISHOP AND CARPENTER, RESPONDENTS, v. JOHN STEWART, APPELLANT.

SALE OF PERSONAL PROPERTY—VERBAL CONTRACT BY VENDEE TO PAY DEBTS OF THE VENDOR—CONDITIONS OF SALE.—One McAvoy, having the possession of certain personal property, and being indebted to B. & C. in the sum of six hundred dollars and to S. in the sum of four hundred dollars, agreed to let S. have the property and to give him a clear title thereto if he would pay the debt due B. & C., sell the property and from the proceeds take out the debt of B. & C., his own debt, and pay the balance to McAvoy. S. agreed to this contract, provided no other person had any claim on the property conveyed. S. took possession of the property, and the next day was notified that McAvoy's title as to a portion of the property was not complete; that he had the privilege of making his title perfect by paying one Goldstone the sum of three hundred and seventy dollars. Whereupon he either made an effort to rescind the contract by informing B. & C. that he would not pay McAvoy's indebtedness to them, or elected to consider the contract rescinded by the terms thereof; but retained possession of all the property after full knowledge of Goldstone's claim, and under a new arrangement, in which B. & C. did not participate, he paid to Goldstone the amount due him, and took a bill of sale for the property from both McAvoy and Goldstone: *Held*, that S. could not, upon this state of facts, avoid the payment of the debt of six hundred dollars to B. & C.

CONTRACT—HOW RESCINDED.—A party cannot rescind a contract and at the same time retain possession of the consideration, in whole or in part, which he has received under it. He must rescind *in toto*, or not at all.

INSTRUCTIONS—WHEN NOT PREJUDICIAL.—Where, upon appellant's own showing of facts, the judgment, if rendered in his favor, would have to be reversed: *Held*, that the instructions given by the court, even if erroneous and contradictory, could not have prejudiced the appellant.

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Argument for Appellant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

Wren & Thornton, for Appellant.

I. The verdict is contrary to, and unsupported by, the evidence, and is against law. The defendant is not liable, because if his promise be construed to pay his own debt to plaintiff out of the funds or goods of McAvoy, or to pay McAvoy's debt to plaintiffs out of McAvoy's goods, there must be a sufficient existing consideration between the plaintiffs and McAvoy on one side, and the defendant on the other. If McAvoy had no title certainly the consideration failed. This must also be the conclusion in the other aspect of the case, viz: that the promise of the defendant to the plaintiff and McAvoy was upon the condition that there were no other claims against the team, and that McAvoy could transfer the team clear. This is only the expression of what the law would imply; the fact being shown without any contradiction that both the express and the implied condition failed, the liability failed also. It is settled that upon a sale of personal property, a warranty of title is implied. (1 Parsons on Con., 456, 457.) A breach of such warranty may be a cause of action in itself, or may be pleaded in defense to an action for the price. (2 Kent's Com., pp. 651, 652, 653; 1 Story on Con., sec. 481, p. 583.) The reader must assume the burden of proof showing that the title of the adverse claim is paramount. (*Scott v. Scott's Adm.*, 2 A. K. Marsh. (Ky.) 218; *Payne v. Rodden*, 4 Bibb. (Ky.) 304; *Chandler v. Wiggins*, 4 B. Monroe (Ky.) 201.) The question whether a loss of the property by process of law was necessary to establish a failure of title, is immaterial in this case. It could only arise between the vendor of the chattel and an adverse claimant. The question was settled by the admission of Goldstone's title by all parties, including the plaintiffs, and its purchase by the defendant. If the plaintiffs had been the vendors of the team, suing for its price,

Argument for Appellant.

their admission of Goldstone's paramount title would have dispensed with the necessity of further proof. Goldstone had the title and right of possession, upon default of payment against the plaintiffs, McAvoy and the defendant. (*Cardinal v. Edwards*, 5 Nev. 36, and cases cited.)

II. The court erred in the second instruction to the jury, on behalf of plaintiff. The words "rescind the contract," may bear either of several instructions. If they mean that Stewart could not escape liability on his promise to the plaintiffs, whether that promise was absolute or conditional, the instruction is erroneous. If they mean that the defendant could not acquire the paramount title of Goldstone, and thus assert a failure of title and consideration between the plaintiffs and McAvoy on one side, and himself on the other, the instruction is incorrect. If the purchase had been fraudulent as between the defendant and McAvoy, the plaintiffs would have had no remedy. They had no lien by mesne, or final process, at the time of sale. If it should appear that the plaintiffs had intended to exhaust all legal remedies against McAvoy, yet without having obtained any lien, their loss is too remote, indefinite and contingent to be the ground of an action. No action lies in their favor for the infringement of such a shadowy right. (*Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Stevenson v. Newnham*, 13 C. B. R. 285; *Moran v. Dawes*, Hopkin's Ch. R. 365; *Penrod v. Mitchell*, 8 Serg. & Rawle, 522; *Kelsey v. Murphy*, 26 Penn. St. 78; *Yates v. Joyce*, 11 Johns. 136; *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145.) The same rule in regard to proof of failure of title, or breach of warranty of title, applies to both real and personal property. (*McGary v. Hastings*, 39 Cal. 360; *Bordwell v. Collie*, 45 N. Y. 494; *Burt v. Dewey*, 40 Id. 283; *Sweetman v. Prince*, 26 Id. 224; *Hamilton v. Cutts*, 4 Mass. 349; *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 Id. 599.) The instructions of the court on behalf of the respective parties, are inconsistent and contradictory upon the real issues in the cause. This is such an error as to justify a new trial. (*People v. Valencia*, 43 Cal. 552.)

Argument for Respondents.

Hillhouse & Davenport, for respondents.

I. The condition which is claimed by appellant to have been annexed to his promise to McAvoy, is immaterial, under the circumstances of this case and the facts proven therein, for the reason that such condition, if any there was, was never brought to the knowledge of the respondents until after they had acted upon the promise of appellant to McAvoy, and not until after they had lost the opportunity of securing their demand against McAvoy by allowing Stewart to take the property of McAvoy into his possession, which was done immediately upon the promise of Stewart, not only to McAvoy, but also to respondents. The liability of appellant to pay the claim of Bishop & Carpenter against McAvoy being fixed, appellant could not relieve himself from such liability by subsequently rescinding the contract, even though he had a right to rescind, without notice to Bishop & Carpenter, and the return of the property to its original position. Appellant could not, under the law, rescind the contract after respondents had acted on the promise made by him to McAvoy and Carpenter. (*Trimble v. Strother*, 25 Ohio St. 378.) The promise of Stewart to McAvoy and Carpenter was binding upon Stewart. (*Barker v. Bradley*, 42 N. Y. 316; *Barker v. Bucklin*, 2 Denio, 45.)

II. The court did not err in giving the instructions asked for by respondents. (*Bohall v. Diller*, 41 Cal. 533; *Purdy et al. v. Bullard et al.*, 41 Id. 444; *Hilliard on Sales*, pp. 262, 273, 278, 279; *Sweetman v. Prince*, 62 Barb. N. Y. 267-69; *Watts v. White*, 13 Cal. 321; *State v. McCauley*, 15 Id. 458; 52 N. Y. 403.)

III. The appellant fails entirely to show any defense of any kind to the cause of action sued upon by plaintiffs. The answer, as originally filed, only denied the sale and the promise. The amendment sets up a conditional promise, and an allegation that Goldstone made claim to the property. The only cases that hold a vendee can, without returning the property or losing it at law, rescind the contract, is in cases where there was actual fraud. (42 Barb. N. Y. 267.) In this case no fraud is pleaded, none proven.

Opinion of the Court—Leonard, J.

By the Court, LEONARD, J.:

On and before the twenty-second day of November, 1875, one John McAvoy was indebted to respondents, who were copartners, in the sum of six hundred dollars, for barley and hay sold and delivered. On the thirtieth day of November, 1875, respondents commenced this action, and in addition to the above facts, alleged in their complaint that on the twenty-second day of November, 1875, McAvoy, above-named, sold and delivered to defendant certain teams, to wit: ten horses and their harness, and three wagons, for which defendant, at the same time and place, agreed with plaintiffs and McAvoy, to pay plaintiffs on the following day the sum of six hundred dollars, United States gold coin, on account of and in settlement of the said demand due plaintiffs from McAvoy, and that no portion had been paid. Plaintiffs demanded judgment for six hundred dollars and interest from the date of the alleged sale and promise.

Defendant denied the sale, delivery and promise alleged, or that any sum was due from him to plaintiffs. At the trial, by leave of the court, defendant filed amendments to his answer as follows:

“Defendant, for a further defense, alleges that his promise to pay plaintiffs six hundred dollars of the amount due them from McAvoy, was upon the express condition that there was no third person who had any claim upon said property described in plaintiff’s complaint; that said property was the property of one S. Goldstone at the time it was delivered to defendant by said McAvoy as aforesaid, and not the property of said McAvoy; that said Goldstone on, to wit: the twenty-second day of November, 1875, and the day after said property was delivered to defendant by McAvoy, claimed said property; whereupon said defendant informed said Carpenter of the fact of said claim, and informed him that he would not pay the said six hundred dollars to him; that by reason of the facts above set forth there was a total failure of consideration for said promise.”

The cause was tried by a jury, who found a verdict for the plaintiff, as demanded in their complaint. Defendant

Opinion of the Court—Leonard, J.

moved for a new trial. The motion was denied, and this appeal is taken from the order overruling defendant's motion, and from the judgment.

The record discloses these facts: On the twenty-second of November, 1875, the said McAvoy was indebted to respondents for barley and hay in the sum of six hundred and twenty-one dollars. He was on that day also indebted to appellant in something like four hundred dollars, upon a promissory note, for money loaned. He had in his possession certain teams, consisting of ten horses and mules with their harness and three wagons, with the usual accompaniments of such an outfit. As to six of the animals with their harness and two wagons, McAvoy, on the seventh of September, 1875, entered into a written agreement with Goldstone, their owner, the former agreeing to buy and the latter to sell the property last named for seven hundred dollars, which was to remain the property of Goldstone until paid for. Two promissory notes for three hundred and fifty dollars each, payable October 16 and November 16, 1875, respectively, were given by McAvoy to Goldstone, and it was agreed that the payment of the two notes should constitute payment for the team.

McAvoy was to have the use of the property during the time allowed him for payment, but the title was not to pass to him from Goldstone until full payment. Should McAvoy fail to pay the notes at maturity, it was agreed that Goldstone might take the property described in the written agreement from any person in possession of the same, and that any money paid less than the whole amount due should be considered and taken as "rent" for the use of the property; "provided however" (so it was stipulated) "that when the second note shall have become due and the said John McAvoy shall be unable to pay the same at maturity, then the said Sam Goldstone agrees to extend the payment of the said second note for the period of thirty days longer from the day of its maturity." McAvoy took possession of the six horses with their harness and two wagons mentioned in the agreement. There is no positive evidence that the first note was paid by McAvoy, but it seems to have been

Opinion of the Court—Leonard, J.

for several reasons. Appellant stated at the trial, that he settled Goldstone's claim on the team a day or two after his promise to pay respondent's bill, by paying between three hundred and fifty and three hundred and seventy dollars. McAvoy testified that Goldstone had a note against him at the time of his agreement with appellants and respondents, but he mentioned only one. Goldstone testified that on the twenty-third of November, 1875, he released his claim upon the team to Stewart in consideration of the agreement of the latter to pay him the money due on the team. So it *seems* that on the twenty-second of November, only the second note was unpaid, and that, under the written agreement, McAvoy had until the sixteenth day of December in which to pay the last note; that during such period he had a right to the use of the property the same as before, and the privilege of keeping the team as his own property by paying the amount due Goldstone.

There were *four* animals, with their harness, and one wagon, delivered by McAvoy to appellant, under the agreement stated in the pleadings, upon which neither Goldstone nor any person other than McAvoy had any claim.

Respondent Carpenter testified that on the twenty-first of November he went to see McAvoy in relation to the payment of the bill due from him to respondents; that McAvoy said he disliked to give up the team, because he wanted to use it; that witness told McAvoy respondents would give him thirty and sixty days further time, if he would get security. McAvoy did not think he could furnish the security, and finally said he would turn over the team of four animals to respondents; that witness and McAvoy soon met appellant; McAvoy and appellant stepped aside and talked privately, and on their return, appellant asked witness how much of respondents' bill he would throw off, if appellant would pay it; that he agreed to deduct twenty-one dollars; that appellant then and there agreed, in consideration of the transfer of the team to him by McAvoy, to pay respondents their bill of six hundred dollars on the following day.

Both parties agreed that, in pursuance of the agreement, whatever it was, the whole outfit was delivered to appellant,

Opinion of the Court—Leonard, J.

and that he continued to retain it after he learned of Goldstone's claim upon a portion thereof, and after informing respondents that he would not pay their bill.

One or two days after refusing to pay respondents' bill, appellant paid Goldstone between three hundred and fifty and three hundred and seventy dollars, and received a bill of sale of the whole team from both Goldstone and McAvoy; nothing was paid to McAvoy.

As to the agreement, appellant testified as follows: "Some time in November, 1875, Carpenter and McAvoy came to my place. McAvoy took me to one side, and said he owed Carpenter a barley bill, and he had no money to settle it; that I had a note against him for five hundred dollars, and that he would turn over the team to me if I would pay the bill he owed Carpenter; that I could keep the team till spring, and if I could sell it for more than would pay my bill and the barley bill, to pay him the balance. *I told him I would take it, provided nobody had any claim upon it.* He turned the team over to me. The next morning I received a letter from Mr. Goldstone, claiming the property he turned over to me. * * * McAvoy assented to this agreement. I told Carpenter the proposition McAvoy had made to me, and asked him what he would take for his bill against McAvoy. He said he would take six hundred dollars. I told him, provided the team was turned over to me, and was not claimed by anybody, I would pay him; Carpenter said he did not think there was any claim on it. I told him I did not know."

Carpenter testified that there was no proviso in the promise made by appellant to pay the six hundred dollars. McAvoy testified: "I turned over to Stewart ten horses, three wagons, harness, etc. I turned the stock over with the understanding that Stewart was to pay Bishop & Carpenter. I don't know what he agreed to pay. I told him I owed them six hundred and twenty-one dollars. He took the property and retained possession of it. I asked Stewart to take the stock and sell it, and to give me the remainder that was over, after paying what I owed him, and this bill. I was owing Stewart close on to four hundred dollars, and

Opinion of the Court—Leonard, J.

the bargain between us was, that I should turn the stock over to Stewart, in consideration of his paying this bill, and then he was to sell it, and after paying what I owed him and Bishop & Carpenter's bill, he was to pay the balance to me. The understanding was, that I was to give him the property clear of all claims. Goldstone had a note against me, and I intended to get money due me in Secret Cañon, and pay Goldstone. Stewart did not know Goldstone had any claim against the property. Stewart may have said something about paying Carpenter, if there was no claim on the team. I calculated to give him a clear title to it. I do not recollect exactly what Stewart did say; I can not give his language. If a man speaks a little low, I can not catch his discourse; I am a little deaf. When Stewart agreed to pay Bishop & Carpenter's bill, he asked me if there was anything against the team. I told him I thought not; that I would make that all right—I would give him the team clear."

Goldstone testified that appellant said in the presence of Bishop & Carpenter, at their office: "The team is out there in the stable, and any one who claims it may go and get it." Bishop testified that he was present when Goldstone and Stewart came to the office of Bishop & Carpenter, and that Stewart did not offer to give up the team to him or anybody else. Carpenter testified that Stewart did not offer to give up the team to him.

Appellant testified that *he only offered to release the team Goldstone claimed; that he told Goldstone he would hold the four horse team for his indebtedness; that there was no particular 'property' upon which he promised to pay respondent's bill; that no particular part of the property was turned over to him for any particular amount; that he had sold six horses and one wagon for between six hundred and seven hundred dollars, and had two wagons, two horses and two mules left. There was no proof of the value of the property remaining in appellant's hands. The separate values of the Goldstone team, and the team owned by McAvoy, without incumbrance, do not appear. Carpenter valued the team at the time appellant*

Opinion of the Court—Leonard, J.

bought it, at sixteen hundred dollars; appellant considered it worth less than one thousand dollars; and McAvoy said it was not worth in the fall of 1875, as much as it was in the spring, but fails to state its value in the spring.

The foregoing is the substance of the evidence affecting this appeal. The case made by appellant's own proof is this: McAvoy was indebted to Bishop & Carpenter in the sum of six hundred and twenty-one dollars, and to him in the sum of four hundred dollars, or thereabouts. McAvoy agreed to let him have the whole property described, and give him a clear title thereto, if he would pay Bishop & Carpenter's bill, sell the team, and from the proceeds thereof, take out what he had paid Bishop & Carpenter, together with the amount of McAvoy's indebtedness to him, and pay any balance to McAvoy. Appellant agreed to this, provided no other person had any claim on the property conveyed. Under this agreement, the whole property was delivered to him, and on the following day he received notice for the first time, that as to six horses with their harness, and two wagons, McAvoy's title was not complete or perfect, but that he had a valuable interest in this portion of the property, to the extent of its use for the period of twenty-four days, and the privilege of making his title perfect by paying the sum of three hundred and seventy dollars. As to four horses, with their harness, and one wagon, McAvoy's title was perfect. Upon being notified that Goldstone had a claim against a portion of the property, he either made an effort to rescind the contract by informing respondents that he would not pay McAvoy's indebtedness to them, or he elected to consider it rescinded by the terms thereof, upon the theory that having made his promise, coupled as claimed, with the promise stated, his liability ceased when the condition failed as to part of the property. But whether he undertook to rescind by informing respondents that he would not pay only, or considered the contract rescinded by its terms, or as having never existed, because of failure of the proviso or condition, or by reason of partial failure of consideration, or on account of fraud; still, in either case, the result was that he retained possession of

Opinion of the Court—Leonard, J.

all the property after ascertaining the extent and character of Goldstone's claim, and did not offer to return any portion to McAvoy, and in a day or two after its delivery, when cognizant of all the facts stated, he paid, under a new arrangement in which respondents did not participate, and to which they did not consent, about three hundred and seventy dollars to Goldstone, and received a bill of sale from both Goldstone and McAvoy.

Upon this state of facts alone, under the pleadings and proofs, independent of the evidence on the part of respondents that appellant's contract was without proviso or condition, and independent of the verdict of the jury upon that issue, it seems clear to us that appellant cannot, in this action, escape payment of the six hundred dollars to respondents.

It cannot be doubted that respondents can maintain this action, if McAvoy could have recovered in an action for the purchase-money, had the same been due to him, and had he seen fit to stand upon the first contract with appellant, instead of entering into another, at a subsequent date. (*Alcalá v. Morales*, 3 Nev. 137; *Barker v. Bucklin*, 2 Denio, 51; Pars. on Cont., vol. i, pp. 467-8.)

The learned counsel for appellant, urge three reasons why, in their opinion, the case should be reversed. We will consider them in their order.

Appellant's counsel urge that upon the facts proved, respondents were not entitled to judgment. At present, we shall consider this objection from the standpoint claimed by appellant, that the contract was coupled with the condition or proviso stated by him.

But when we speak of the contract we do not refer simply to the promise of appellant to pay respondents the six hundred dollars, provided there was no other person who had a claim on the property, but we mean the whole contract, including the proviso just mentioned; for there was but one contract, and that was entire. The consideration was entire on both sides. On the side of McAvoy, it was the whole team, with a warranty of title express and implied; on the part of appellant, it was an agreement to pay respondents'

Opinion of the Court—Leonard, J.

bill of six hundred dollars, sell the team, and from the proceeds of its sale pay McAvoy whatever might remain, after deducting the barley bill and McAvoy's indebtedness to him, *provided nobody had any claim upon it*. Appellant's statement of the contract shows plainly that the proviso was attached to the entire contract, and not alone to his promise to pay respondents. Here it is: "McAvoy said he owed Carpenter a barley bill, and he had no money to settle it; that I had a note against him for five hundred dollars, and that he would turn the team over to me if I would pay the bill he owed Carpenter; that I could keep the team till spring, and if I could sell it for more than would pay my bill and the barley bill, to pay him the balance. *I told him I would take it, provided nobody had any claim upon it. He turned the team over to me.*" Conceding, then, that the proviso stated existed as to the entire contract, it was in the nature of a condition subsequent, which might, at appellant's option, avoid the agreement if it failed as to any part of the property, but the sale was complete, and McAvoy's title to the property passed to appellant at the time of delivery, notwithstanding the condition, and no one but appellant could complain or take advantage of its failure. (Story on the Law of Sales, p. 233, note 3; *Id.*, p. 239, note; *Dorr v. Fisher*, 1 Cushing, 271.)

And although, *prior* to the contract and delivery of the property to appellant, respondents had no right in or claims upon it which hindered its *bona fide* transfer, yet the moment the agreement was made in part for the benefit of respondents, and the property delivered in accordance with its terms, they had fixed rights which could not be changed to their injury without their consent, except by acts of appellant, which alone, under the law, could relieve him from the burdens he had assumed.

McAvoy *might* have made a *bona fide* sale and transfer of the property, to the exclusion of respondents; but the fact remains that he *did not* do so. He protected them by the terms of the agreement, and applied six hundred dollars of the purchase-money to the payment of their claim. Therefore they had the right to reckon appellant's promise,

Opinion of the Court—Leonard, J.

instead of McAvoy's indebtedness, as a portion of their assets, until appellant, by lawful means, should become relieved of the obligations he had assumed. It is necessary to ascertain whether or not appellant's acts were sufficient to entitle him to such relief, and consequently to a judgment in his favor in this case. It is important to keep in mind these facts: that the whole title of McAvoy, as well as all his rights and interests in the property, passed by delivery to appellant, and that, notwithstanding the proviso or condition, appellant could, at his option, waive the condition, retain the property and insist upon all the benefits to be derived from the contract after the condition failed; that at the time of the contract and delivery, McAvoy had a perfect title to four horses and their harness and one wagon, and that, in the balance of the property, he had valuable rights, to wit: its use for twenty-four days, and the entire property therein by paying, in the meantime, the sum of three hundred and seventy dollars. The whole property, then, was valuable, not only to McAvoy, but to appellant. It is difficult to see how the condition or proviso relied upon by appellant in this case differs from a warranty of title, or how, under it, he can claim any other or greater rights than he could have done had his plea been a breach of warranty, or fraud in the sale, with prayer for damages. For instance, A. has two teams. He says to B.: "This team is mine. I will sell it to you for one thousand dollars, and warrant the title." B. replies: "I will take it, if no one has any claim on it." A. assures him that his title is perfect. B. pays the purchase-money and the team is delivered to him.

A. then says to C.: "This team is mine; I will sell it to you for one thousand dollars and warrant the title." C. replies: "I will take it," and the team is thereupon delivered to him. In the first case, the vendee, in his acceptance, in terms expresses a condition, and in the last he does not. In each case there is an express and implied warranty of title, and in each the vendee takes the property with the understanding that he gets a clear title. Besides, the remedy of each is the same, in case of failure of title, in whole or in part.

Mr. Hilliard, in his work on contracts, vol. i, p. 140, says: "It is to be further remarked, with reference to the so-called *mutual* stipulations of the respective parties to the contract, that no subject has been more prolific of nice distinctions and conflicting decisions than that of the dependence or independence of such covenants."

The practical difference is expressed as follows: "When there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition will excuse the other party from all further performance of stipulations depending upon such prior performance. But a failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing, to damages, does not excuse the party on the other side from the performance of all stipulations on his part." (*Mill Dam Foundry v. Hovey*, 21 Pick. 437; Story on Cont., vol. ii, 250; 8 Bing. N. C. 175.)

In *Kingston v. Preston*, Dougl. 690, Lord Mansfield says: "The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance." So says, also, Sergeant Williams in *Pordage v. Cole*, 1 Wms. Saunds. 319, i, and adds: "If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act.

And where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independant covenant, and an action may be maintained for the breach of the covenant on the part of the defendant, without averring perform-

Opinion of the Court—Leonard, J.

ance in the declaration." The leading case upon the last point is *Boone v. Eyre*, 1 H. Bl. 273, note (a): The plaintiff conveyed to the defendant the title in equity of redemption of a plantation in the West Indies, together with a stock of negroes upon it, in consideration of five hundred pounds and an annuity of one hundred and sixty pounds per annum for life, and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all *and everything on his part to be performed, he, the defendant, would pay the annuity.*

The action was brought for the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes, and so had not a good title to convey. In ruling upon the demurrer to the plea, Lord Mansfield said: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but when they go only to a part where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea be allowed, any one negro not being the property of the plaintiff, would bar the action."

And Sergeant Williams, in commenting on this case, remarks as follows: "The whole consideration of the covenant on the part of B., the purchaser, to pay the money, was the conveyance by A., the seller to him, of the *equity of redemption* of the plantation, and also of the stock of negroes upon it. The excuse for the non-payment of the money was, that A. had broken his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had, in part, executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes." (Parsons on Cont., vol. ii, 531, note, and 676-7; Story on Cont., vol. ii, 516 *et seq.*)

Opinion of the Court—Leonard, J.

It is plain to our minds that the proviso claimed by appellant was not intended by the parties to be in the nature of a condition precedent. Appellants promised to pay respondents on a day certain, the day following the contract, which was wholly inconsistent with the idea that he should not pay until it should be shown beyond question that no other person had a claim upon the property. Certainly he knew that any claimant might not make his claim known before the time appointed for payment.

As before stated then, McAvoy's whole title and interest in the team passed, with the delivery, to appellant, whose liability to respondents then became fixed, and now remains, unless by his subsequent acts he was released.

Undoubtedly appellant had a right to claim a clear title to the property, and certainly, as between him and McAvoy, he had ample remedy, if the title failed in whole or in part. But in this case his remedy under the pleadings and proofs, is limited to one defense, which is a failure of the proviso or condition claimed, as a plea in bar of the action, and as a consequence, failure of consideration; he also asked, and received, favorable instructions on the question of fraud, although that defense is not directly pleaded.

There having been but partial failure of consideration, and the condition being subsequent, should it be admitted that appellant had a right to rescind the contract on the ground of fraud, or because of the failure of the condition, or for any other reason, still his privilege was, also, to waive the condition in his favor, or the fraud, and insist upon the remaining benefits of the contract; or he might, by his acts, forfeit his right to treat the contract as void. (Hilliard on Cont., vol. i, pp. 305, 333, 340; *Burton v. Stewart*, 3 Wend. 339; *Thayer v. Turner*, 8 Metc. 552; *Benj. on Sales*, 453; *Desha's ex'rs v. Robinson, adm'r*, 17 Ark. 240.) And in case of such waiver or forfeiture he would be held to the terms of the contract; that is to say, the fraud or condition subsequent would not bar the action, and his only remedy would be damages for breach of warranty, or fraud, under proper pleadings, in which case no return of the property would have been required.

Had Goldstone's claim on the team been ten dollars, instead of three hundred and seventy dollars, appellant could have paid that amount, kept the property, and looked to McAvoy for repayment, as in that case he probably would have done. So he could pay the three hundred and seventy dollars and keep the property as he did. But having done so, for the purposes of this action, the contract, as to respondents, was continued in force. There was nothing to hinder a return of the property to McAvoy, with the notice of such return to respondents, thus placing all parties in such a position that their rights and interests could be protected; but there should have been, and there was, much to prevent appellant from getting and retaining possession of all the property under the contract, and thereafter refusing to comply with his agreement to pay respondents.

No principle is better settled than that a party cannot rescind a contract and at the same time retain possession of the consideration, in whole or in part, which he has received under it. He must rescind *in toto*, or not at all. (*Jewett v. Petit et al.*, 4 Mich. 512; *Hendricks v. Goodrich*, 15 Wis. 679; *Sumner & Co. v. Parker*, 36 N. H. 454; *Webb v. Stone*, 24 N. H. 288; *Jennings v. Gage et al.*, 13 Ills. 612; *Stoddard v. Graham*, 23 How. Pr. 518; *Ogburn v. Ogburn*, 3 Porter, 129; *Desha's ex'rs v. Robinson, adm'r, supra*; *Reed v. McGrew*, 5 Ohio, 386; *Perley v. Balch*, 23 Pick. 285; *Minor v. Kelly*, 5 Mon. 274; *Barnett v. Stanton & Pollard*, 2 Ala. 189; *Cocke et al. v. Ruck's guardian*, 34 Miss. 109; *Utter v. Stewart*, 30 Barb. 20; *Clark v. Baker*, 5 Mete. 461; *Bryant v. Isburgh*, 13 Gray, 611; *Hunt v. Silk*, 5 East, 225; *Carter v. Hurden & Walker*, 2 Rich. 46; *Christy v. Cummings*, 3 McLean, 386; *Bain v. Wilson*, 1 J. J. Marsh. 203; *Morse v. Brackett*, 98 Mass. 207; Story on Sales, 492 *et seq.*; *Id.* 505 *et seq.*; 2 Pars. Cont. 678; *State of California v. McCuuley*, 15 Cal. 458.) In the case last cited the court, following a long line of decisions, refused to decree a right of rescission in the plaintiff, because the contract having been partially executed, and consequently there having been only a partial failure of consideration, the parties could not be replaced in their previous condition; and because the state did not offer to

Opinion of the Court—Leonard J.

make restitution of the property received. If the law refused relief to the vendee when he cannot restore the property to the vendor, unless the fault lies with the latter, it surely will not grant it to one who can restore the property, but will not.

In *Ogburn v. Ogburn*, *supra*, the court says: "As a vendee of a chattel, who has paid the purchase-money, cannot maintain an action to recover it back, for the want of title in his vendor, while he has and is in the undisputed possession of the chattel, how can one in the same circumstances prevent the recovery of the purchase-money? To sustain the defense would be a rescission of the sale. We think no defense can be made to an action for the purchase-money when the facts relied upon to make it would not, if the parties were changed, and the money had been paid, enable the vendee to recover it back for the breach of the warranty of title."

Had appellant paid McAvoy one thousand dollars in money for the property and received it under the same contract, or had that amount been paid by him to respondents in satisfaction of a debt due to them from McAvoy, it would not be seriously contended that it could be recovered back by appellant without returning, or offering to return, all of the property of any value to either party, received by him.

In *Thayer v. Turner*, 9 Metc. 552, it is said by Shaw, C. J., "that a sale made under false representations is not *ipso facto* void, but it is voidable at the election of the party defrauded. The vendor who has parted with his property upon such false representations, may insist that no title passed to the vendee or to any other person claiming under him, other than a *bona fide* purchaser for value, and without notice of the fraud. And in such case, the vendor may maintain replevin or trover for his property. But the rule thus laid down is always accompanied with this qualification, that the power of rescinding in the case stated, is at the election of the party defrauded. Although he is imposed on, he may keep the property and affirm the sale, or he may rescind at his option. But if he elects to rescind the sale, he must return and restore to the other party, the whole of the consideration, whether money, goods or securities re-

Opinion of the Court—Leonard, J.

ceived by way of consideration for the sale, which may be of value to either party."

"A condition precedent corresponds to the suspensive condition of the civil and Scottish law, and a condition subsequent to the resolute condition. Mr. Brown, in his Treatise on Sales, says: 'A condition resolute, when it is accomplished, puts an end to the contract, but does not suspend its existence.'

The contract is perfect, notwithstanding the presence of a condition subsequent, and is merely liable to be rescinded on the condition being accomplished." (Story on Sales, p. 233, note 3.

And in commenting upon a contract of sale of hemp "on arrival" of a certain ship, the same author, p. 239, note, says: "The fairest interpretation of the contract would seem to be, that the sale was absolute, with a condition subsequent or resolute; that is, it was a present sale, with the condition that if no hemp arrived, the sale was to be null. The condition was not precedent, for, provided the hemp had arrived, it would not have become the property of the vendee at the time of the arrival; but it would have been his property from the time when the note was given. It was not necessary before the property passed, that the condition should be performed, but it was agreed that, if a certain condition did not happen, the sale should thereby be defeated. In like manner a person would buy an article on a warranty, or on trial, and if the condition should fail, the sale would be avoided; but it would yet have been a complete sale; so that if the vendee did not take advantage of the failure of the condition, no one could."

We are of the opinion, therefore, that the condition claimed is not a bar to this action; that by reason of appellant's failure to restore the property, the condition was waived, and his promise to pay respondent's bill of six hundred dollars, remains in full force. Having arrived at this conclusion from appellant's theory of the case, it is of course unnecessary to consider this objection in the light of respondent's proofs and the verdict of the jury.

It is next urged that the second and fourth instructions

Points decided.

for respondents, were erroneous, and that the instructions on behalf of the respective parties were inconsistent and contradictory upon the prominent legal issues of the case; and that the fact last stated, alone constitutes an incurable error. We do not deem it necessary or advisable to prolong this opinion by a review of the several instructions, although we are satisfied that the instructions given for respondents were substantially correct in principle, and that the contradictions and inconsistencies claimed by counsel for appellant, arise from a view of the law too favorable for appellant, so far as is shown by the instructions given in his behalf.

We have seen that respondents were entitled to a verdict and judgment in this case upon facts admitted by appellant to be true. Under such circumstances the court could not have refused to grant a new trial, if the verdict had been for defendant, and the instructions given could not have prejudiced appellant, even though they were erroneous and contradictory. (*Green v. Ophir C. S. & G. M. Co.*, 45 Cal. 527.) The verdict and judgment should have been the same, had the instructions been correct and consistent with each other.

The order and judgment of the court below are affirmed.

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[No. 839.]

O. W. WARD, RESPONDENT, v. CARSON RIVER WOOD COMPANY AND D. R. HAWKINS, APPELLANTS.

ACTION OF TROVER—TITLE TO LAND, WHEN IMMATERIAL.—In an action of trover to recover the value of wood cut by defendants, under a contract with plaintiffs, upon land to which the plaintiffs claim possessory title. *Held*, that the defendants could not defeat a recovery by showing the title to be in the government of the United States, unless he connects himself with the government title.

TITLE TO PROPERTY—WHEN NOT AFFECTED BY DECLARATIONS OF THE ASSIGNEE OF A CONTRACT.—Where the terms of a contract for cutting wood required the parties of the first part to advance certain supplies and such moneys as they deemed "necessary to conduct the business to the best interests of both parties," and the contract was assigned by the parties of the first part to S. & Co., who refused to make any further advances, and said to the parties of the second part: "The wood is your wood to-

Statement of Facts.

day; it ain't my wood; it is your wood, and I can't go any further. I want you to keep the wood, and I will buy it from you when it is put into Wolf Creek:" *Held*, that such declarations did not vest the title to the wood in controversy in the parties of the second part.

IDEM—ESTOPPEL.—*Held*, that the plaintiff was not estopped by such declarations from asserting his title to the property.

TAX TITLE—CERTIFICATE OF SALE—WHEN SIGNATURE OF OFFICER MUST BE PROVEN.—It is essential to the validity of a certificate of sale, executed by an officer of another state, that it be shown that the person signing it is the officer authorized by the laws of that state to execute it, and that his signature thereto is genuine.

IDEM—SALE OF PROPERTY FOR TAXES.—Where property is sold for taxes in a summary manner, without any regular proceedings in a court of justice, it is essential that all the requirements of the law should be strictly complied with.

ACTION OF TROVER—WHEN DEMAND NOT NECESSARY.—When there has been an actual conversion of personal property, no demand is necessary, in order to sustain the action of trover.

IDEM—CONVERSION.—The taking of personal property under an invalid sale, with the intent to convert it to one's own use, amounts to a conversion, and the true owner of the property can recover its value in an action of trover, without making any demand, notwithstanding the fact that the purchaser purchased the property in good faith, believing his title to be valid.

IDEM—PLACE AND TIME OF CONVERSION—LIABILITY OF BAILEE.—A. was the owner of wood in Alpine county, California. It was there wrongfully taken by B. and C., claiming it as their own. It was delivered in the Carson river to D., as a bailee for B. and C., and transported to Empire City, Nevada, at the expense of B. and C., and was there sold to E., where a demand for the wood was made by A. of the bailee, and refused. *Held*, that the conversion took place in Alpine county, California; that the refusal of the bailee to deliver the wood when demanded, did not amount to a new conversion; that by the refusal, the bailee became liable to the same extent that B. and C. and E. were liable, and no more, and that they were only liable for the value of the wood at the place of conversion.

IDEM—MEASURE OF DAMAGES.—There being nothing in this case calling for special or exemplary damages; *Held*, that the plaintiff was entitled to recover the value of the wood at the time of the conversion, with legal interest from that date up to judgment.

APPEAL from the District Court of the Second Judicial District, Ormsby county.

The facts are stated in the opinion of the court.

Petitions for a rehearing were filed by both parties and refused.

Argument for Appellant.

The answer to the petition of respondents for a rehearing, contained a corrected statement of facts. The answer to appellant's petition, was only with reference to the question of estoppel. The opinion as published, contains the substance of the opinion of the court on rehearing.

Robert M. Clarke, for Appellant.

I. The action being trover, the measure of damages should be the price of the wood in Alpine county, where the conversion, if any, took place. (8 Nev. 345; 2 Nev. 123; 33 Cal. 117; 19 Maine 361; 34 Cal. 641; 3 Sandford 614.) By suing in trover, the plaintiff waived the tort, and abandoned his right to the property. He consented to treat defendant as the owner of the wood. His cause of action arose, if at all, when the taking occurred; his rights, if any, then commenced; and no correct rule will permit those rights to be enlarged or made more valuable by reason of labor performed or money invested by defendant after they accrued, and after the cause of action arose, especially in a case like this, where the defendant is shown to have acted in good faith.

II. The court erred in excluding the evidence of the tax title. (Sec. 3794 Pol. Code of Cal.; Cooley on Taxation, p. 195.)

III. The court erred in denying defendant's instructions, to the effect that boundaries of timber land of the United States, must be plainly and distinctly marked before a possessory title to them can be acquired, and that no such title can be acquired to timber land under the laws of California.

IV. If, as the defendant maintained, and as the proof clearly warranted, the plaintiff and grantors were to furnish supplies sufficient to enable defendants' grantors to deliver the wood into Wolf Creek, and if, as alleged, and as the proof clearly warrants, the plaintiff's grantor refused to furnish such supplies, and gave up his rights under the contract and all claim to the wood, and told the defendants' grantor that the wood was his, and that he should take it and do what he pleased with it; and thereafter neither plaintiff nor his grantor did or would perform said contract,

Argument for Respondents.

on their part, and never had or received the wood at Wolf Creek, or elsewhere, and the defendants' grantor, acting upon such abandonment, took the wood and sold it to the defendant, and the defendant, in good faith, paid for the wood, and transported it from Alpine county, in the state of California, to Empire City, in the state of Nevada—in that case, whatever may have been originally the rights of plaintiff's grantor, they were fully relinquished and canceled, and the defendants' rights, as against the plaintiff, were complete.

The vendors of appellant Hawkins were induced to expend large sums of money, upon the faith of the declarations made by Stadtmuller in the purchase and removal of the wood, and as Stadtmuller was, at the time of making such declarations, the absolute owner of the contracts, the plaintiff is estopped by such declarations from now claiming the wood, or denying the title of appellant Hawkins. (24 Vt. 270; *Rowley v. Bigelow*, 12 Pick. 307, 315; *Salem Bank v. Gloucester B.*, 17 Mass. 1; *Parsons on Con.*, vol. ii, 340-9; *Copeland v. Copeland*, 28 Me. 525; *Preston v. Mann*, 25 Conn. 128; *Story on Agencies*, sec. 91; *Gosling v. Birnie*, 7 Bing. 339; *Heane v. Rodgers*, 9 B. & C., 577, 578; *Clark v. Clark*, 6 Esp. R. 61; *Like v. Howe*, Id. 20; 4 Munroe, 50; 5 B. & C. 153; 7 Can. & P. 501; 6 Ad. & El. 479; 8 Wend. 483; *Peake's Cas.* 203; *Dezell v. Odell*, 3 Hill, 222; *Thompson v. Blanchard*, 4 Coms. 303; *Hill v. Epley*, 31 Pa. St. 331; *Newman v. Edwards*, 34 Id. 32; *Hackett v. Callender*, 32 Vt. 97; U. S. Digest, vol. iv., sec 828; 12 Pick. 307, 315; *Boggs v. Merced Co.*, 14 Cal. 368; *Henshaw v. Bissell*, 18 Wall. 271; 27 Mich. 435; *Gregg v. Wells*, 10 Ad. & El. 90; *Cornish v. Abington*, 4 H. & N. 549; *Woodley v. Coventry*, 2 H. & C. 164; *Buchanan v. Moore*, 13 S. & R. 304; 30 N. Y. 226; 6 John Ch. 166; 47 N. Y. 493; *Freeman v. Cook*, 2 Ex. 654; 8 Wend. 480; 8 Barb. 102; 8 E. C. Green (N. J.) 84; 3 Hill. 215; 9 Allen, 455; 11 Id. 340; 14 Cal. 368; 18 Wall. 271.)

Ellis & King, for Respondents.

I. The contract was not abandoned by Ward through Stadtmuller. Stadtmuller & Co. were mere mortgagees;

Argument for Respondents.

they could not, by mere empty declaration, vest title to this property in Dixon or Bertrand so that they could make a good and sufficient title to third parties. There was no consideration passed to Stadtmuller; there was no delivery of possession.

II. The corporation defendant actually converted the wood to its own use. The terms of its refusal to deliver it upon demand, amounts to a conversion of the wood. A demand and refusal is equivalent to, or rather is, conclusive evidence of a conversion. (*Whitman G. & S. M. Co. v. Trille*, 4 Nev. 503.) The question always is, does the defendant exercise dominion over the property in question in defiance of plaintiff's right? If it does, that, in law, is a conversion, whether it be for his own or another person's use, as in this case. (5 Cowen, 325; 1 Chitty Pl. 157; 1 Dev. N. C. 308; also cases in 4 Nev. 502.) If the plaintiff had seen proper to bring his action of replevin on the eleventh of September, 1876, he could have got possession of the property itself, or in lieu thereof, the value of that property at that time and place. The action of trover which was brought, is precisely the same in legal effect as the action of replevin. The mere form of action cannot change the substantial rule of damages or compensation. The plaintiff having the right of dominion and right of possession over this property, anywhere in the world, he has the right to elect the point at which he will undertake to acquire possession of his own. (*Hisler v. Carr*, 34 Cal. 644; 2 N. Y. 295; *Sillsbury v. McCoon*, 3 Coms. 381; 4 Nev. 494; 7 Cowen, 94; 6 Johns. 168; 8 Wend. 508; 5 Johns. 348.) The defendant corporation—the real party who is guilty of conversion in this case—never had possession of the property until it was delivered in the Carson river. The question here is not one of fluctuating values, but it is as to when the conversion took place, whether or not it was not a distinctive conversion at Empire City on the eleventh of September, at the time the demand was made. It appears that the property was at that time, and in that manner, converted by the defendant, and by that distinct act of conversion this action has been brought, and has been fully sustained by all the proof. To permit the defendant to escape with

the value of the wood at a certain time, on the ranch, would be tantamount to permitting him to take advantage of his own wrong. If this property had been transported to any other State in the Union, and plaintiff had followed it up, and made his demand, defendant would have been under obligations to surrender the possession at the time and place where the demand was made, and the value of the property at that time and place in that jurisdiction, would be the measure of damages.

III. The defendants claim that they came into possession of this property under color of law. In such a case, before the action of trover can be maintained, it is essential to make demand, and until such demand is made, and a refusal by the defendants to deliver, there is no conversion for which trover can be maintained. (Addison on Torts, 454, also 398-9; 2 N. Y. 295.)

IV. The defendant's alleged tax title is utterly worthless. He totally failed to show a compliance with the statute of California on that subject.

V. Hawkins cannot destroy his liability to pay the value of the wood at Empire by proving that some other tortfeasors—his pretended predecessors in interest—had, at another time and place, converted the same property, and thus, by a wrongful deraignment of a spurious title by relation, be carried back to a so-called conversion committed by some stranger to the record. He cannot plead in extenuation the wrongful acts of his predecessors, any more than he can be held responsible for those acts with which he was in no wise connected. (3 N. Y. 381, 390, and cases cited; Sedgwick on Dam. 484.)

By the Court, HAWLEY, C. J.:

This is an action of trover, brought against the Carson River wood company, a corporation, to recover the value of one thousand eight hundred and sixty-two cords of merchantable pine cord-wood, which plaintiff alleges was wrongfully converted by said defendant on the eleventh day of September, A. D. 1876, at Empire City, in Ormsby county, Nevada.

Opinion of the Court—Hawley, C. J.

The answer of the Carson River wood company, after denying the plaintiff's ownership of the wood, alleges that one D. R. Hawkins was, prior to the commencement of this suit, and is now, the owner of said cord-wood; that on the nineteenth day of July, 1876, at Alpine county, California, said D. R. Hawkins and one S. W. Griffith, then being the owners of the wood, delivered the same into the possession of the Carson River wood company, as their agent and bailee, to be by it driven and transported down the Carson river to Empire City; that said wood was so driven and transported by said company, and is now held by it as the agent and bailee of the said D. R. Hawkins, and not otherwise.

D. R. Hawkins subsequently intervened and filed an answer, as a defendant in said cause, denying plaintiff's ownership of said wood, and asserting ownership and possession in himself.

The cause was tried before a jury, and resulted in a judgment against the defendants for thirteen thousand and thirty-four dollars, and costs.

The defendants moved the court for a new trial, which was refused. From this judgment and order defendants appeal. From the record it appears that one Sol Simpson, as a party of the first part, on the fifteenth day of May, A. D. 1875, entered into a written contract with one Sam Dixon, as a party of the second part, the terms of which are as follows: "The party of the second part agrees to cut, split, bank, and run into the main stream of what is known as Wolf creek, in Alpine county, California, three thousand cords of good, merchantable wood; said wood to be cut on what is known as the Simpson & Ward ranch, on said Wolf creek; * * * to pile the wood four feet and two inches high, * * * and have the same completed on or before the first day of June, A. D. 1876. The party of the first part agrees to pay the party of the second part three dollars and fifty cents per cord for each and every cord delivered as aforesaid in payment, as follows: To furnish the said second party with tools, provisions, and team necessary for use in cutting said wood; also with what money the party of the

Opinion of the Court—Hawley, C. J.

first part may deem necessary to conduct the business to the best interest of both parties. It is further agreed that no money shall be paid until after September 1, 1875, and the balance due after the completion of this contract to be paid thirty days after all the wood is out of the river at Empire City, Nevada."

On the first day of December, A. D. 1875, a similar contract was made between Sol Simpson and O. W. Ward, parties of the first part, and Louis Bertrand, of the second part, for cutting, splitting, banking and fluming into Wolf creek one thousand cords of wood, more or less, the contract to be completed on or before the first day of May, A. D. 1876; the price per cord to be three dollars and twenty-five cents. In this contract the parties of the first part "further agree to pay the party of the second part, fifty cents per cord for fluming two hundred cords of wood left out of wood cut by St. John and Mayo, and owned by the said first parties." * * * "The parties of the first part further agree to pay said second party for fluming the above mentioned two hundred cords of wood as soon as the work is completed, and to pay five hundred dollars on cutting after the wood is measured."

Prior to, and at the time of the making of these contracts, Sol Simpson and the respondent Ward, claimed the land upon which the wood was cut, and upon the trial much testimony was offered tending to show that they had a good possessory title to the timber land known as the Simpson and Ward ranch, and that they had purchased the land known as the St. John ranch, from St. John, who claimed to have the possessory title thereto.

The contract made with Bertrand did not specify upon what land the wood was to be cut, but nearly all of it was cut on what is known as the St. John ranch. Of the wood in controversy in this suit, one thousand and seventy-nine cords were cut under the contract, by Dixon, on the Simpson and Ward ranch; two hundred and eleven cords belonged to Simpson and Ward under their purchase from St. John; the balance was cut, under the contract, by Bertrand.

On the thirtieth of March, A. D. 1876, upon settlement of

Opinion of the Court—Hawley, C. J.

accounts with Dixon, it was ascertained that five thousand three hundred and sixteen dollars and eighty cents had been advanced to him in money, provisions and supplies. The amount of the wood that had been cut by Dixon was two thousand two hundred and seven cords. Of that amount, three hundred and eighty-nine cords had been delivered to Sol. Simpson. After deducting the contract price of the three hundred and eighty-nine cords, and the sum of five hundred and fourteen dollars and fifty cents, for labor, there remained a balance of three thousand three hundred and forty dollars and eighty cents, more than sufficient to pay for the value of the one thousand and seventy-nine cords at the ranch where cut, and nearly enough to pay the contract price at the point of delivery. The amount advanced by Simpson & Ward to Bertrand was one thousand and eighteen dollars and twenty-three cents, being over two thirds of the value of the wood cut by him. At the time of this accounting the contracts were, by Simpson & Ward, assigned to Stadtmuller & Co., of Empire city. The assignments were made "for value received," and thereafter, on the ninth day of September, 1876, Stadtmuller & Co., "for a valuable consideration," sold and transferred to O. W. Ward, respondent, all their right, title and interest in and to the wood in controversy. At the time of the assignments of the contracts to Stadtmuller & Co., Ward informed Dixon and Bertrand that Stadtmuller & Co. would run the business with them, and it appears that Stadtmuller & Co. (for Ward) then advanced, in money and supplies, the sum of one hundred and ten dollars. Whether the assignments to Stadtmuller & Co. were made as security for any advances they might make to Dixon and Bertrand, does not definitely appear from the record; but the facts that do appear, warrant the conclusion, claimed by respondent's counsel, that it was not an absolute sale. Ward testified that he owned the contracts between the thirtieth of March, 1876, and the tenth of September, 1876, although they had been assigned to Stadtmuller & Co. This testimony is not denied; but it does not, perhaps, very clearly appear that Dixon or Bertrand had any notice that

Ward was the real owner, and therefore in determining the effect of any declaration made by any of the firm of Stadtmuller & Co., it will, by us, be assumed that they were the real owners of the contracts and of the wood in controversy at the time the declarations were made.

About three weeks after the assignments were made, Dixon and Bertrand applied to Stadtmuller & Co. for more supplies. Stadtmuller informed them that he had ascertained that the matters were not as they had been represented, and for that reason he would not have anything more to do with the business. He refused to make any further advances, and said to Dixon and Bertrand: "The wood is your wood to-day; it ain't my wood, it is your wood, and I can't go any further. I want you to keep the wood, and I will buy it from you when it is put into Wolf creek or in the main river." After this conversation, Dixon applied to Ward for supplies, and was told that he had better go up the river and wait. Ward said: "I don't want to give you any money; if I do, I will have to raise it on my house;" and added: "You had better go and see Stadtmuller." No supplies were furnished after this conversation; no more wood was cut, and no attempt was made by Dixon or Bertrand to get the wood into Wolf creek, or into the Carson river, except by repeated efforts to obtain further supplies, which, they claim, was necessary for them to have to enable them to comply with their contracts. Failing to get any further supplies, Dixon, after consulting with S. W. Griffith, county judge of Alpine county, on the fourth of May, 1876, sold and delivered the wood then on the Simpson & Ward ranch, to L. M. Buel, county clerk of Alpine county. Buel afterwards sold the same to D. R. Hawkins. Bertrand, at the same time, sold and delivered the wood on the St. John ranch, to S. W. Griffith. Griffith afterwards sold it to A. M. White, and White, at Griffith's suggestion, afterwards conveyed the same to Hawkins. A portion of the wood cut under the Dixon contract was removed from the Ward & Simpson ranch by Buel, before he sold the wood to Hawkins, and a portion of it was removed by Hawkins after he purchased it from Buel.

Opinion of the Court—Hawley, C. J.

Hawkins claimed to own all this wood at the time it was delivered to the Carson river wood company. The wood cut under the Bertrand contract was removed from the St. John ranch by Griffith, and was not conveyed to Hawkins until after it arrived at Empire city. The expenses for fluming the wood down Wolf creek were paid, or agreed to be paid, in the first instance, by the respective parties, Buel, Hawkins and Griffith. But Hawkins, in purchasing the wood, assumed all the expenses incurred by its transportation.

1. It is first claimed by appellants that the court erred in denying certain instructions, asked by them, to the effect that the boundaries of timber lands in the United States must be plainly and distinctly marked before a possessory title thereto can be acquired, and that no such title can be acquired under the possessory laws of California.

In determining this question, it must be remembered that the title to the land is not in controversy in this action. The question whether plaintiff had the possessory title is, in our opinion, immaterial. The fact is undisputed that Simpson & Ward claimed to have the possessory title; that Dixon and Bertrand entered into the contracts agreeing to cut the wood for them, and that the wood was cut upon said lands under these contracts. We are of opinion that appellants could not defeat a recovery of the wood, by plaintiff, by showing the title to the land to be in the government of the United States, unless they in some manner connected themselves with the government title. (*Weymouth v. Chicago and Northwestern Railway Company*, 17 Wis. 550; *Hungerford v. Redford*, 29 Wis. 346; *King v. Orser*, 4 Duer, 431; *Carter v. Bennet*, 4 Fla. 355; *Cook v. Puttersen*, 35 Ala. 102.)

2. Did the declaration of Stadtmuller, as argued by appellant's counsel, vest the title to the wood in controversy, in Dixon and Bertrand?

There is nothing in either of the contracts to the effect that if Simpson, in the one, or Simpson & Ward in the other, failed to comply with the terms of the contract, the wood cut thereunder should belong to Dixon or Bertrand;

Opinion of the Court—Hawley, C. J.

nor is there any agreement that either Dixon or Bertrand should have any lien upon the wood to secure the contract price. The testimony fails to establish an abandonment of the contracts upon the part of Simpson & Ward. More money, provisions and supplies had been furnished by them than the contracts called for. By the express terms of the contract, they were not to pay for the wood until it was out of the river at Empire. They were only required to advance such amounts of money as they deemed "necessary to conduct the business to the best interests of both parties," and there is no positive proof that they did not, prior to the assignments, furnish all the supplies that were necessary to enable Dixon and Bertrand to fully complete the contracts. But even if we should admit, for the sake of the argument, that the declarations of Stadtmuller amounted to an abandonment, it does not necessarily follow that the effect of the abandonment was to vest the title of the wood previously cut under the contracts, in Dixon and Bertrand. How could the unexplained and singular declaration, and expression of opinion, of Stadtmuller, vest the title in the men who cut the wood? There was nothing said by him that amounted to a sale; nothing that amounted to a gift; no delivery or transfer of possession; nothing but the mere gratuitous expression of an opinion that the wood was theirs, and that he would buy it from them when they put it into Wolf creek or into the Carson river. Whatever might be the effect of this statement in an action to recover damages for a breach of the contracts, it seems to us very clear that it did not, under the proofs in this case, vest the title to the wood in Dixon and Bertrand. It therefore, necessarily follows that the sale by Dixon and Bertrand conveyed no title to the purchasers. It is contended by appellant that inasmuch as Hawkins and his predecessors in interest, relied upon the declarations of Stadtmuller that the wood belonged to Dixon and Bertrand, and were thereby induced to purchase the wood, paying full value therefor, and expending large sums of money thereon; that Stadtmuller and his assignee are estopped from asserting any title to the wood.

Opinion of the Court—Hawley, C. J.

It is evident that the facts relied upon—if they had been properly pleaded—are wholly insufficient to constitute an equitable estoppel *in pais*.

The declarations of Stadtmuller were not made to either Buel, Griffith or Hawkins, and they cannot claim that they were induced thereby to expend any money on the faith thereof. If they had applied to Stadtmuller to ascertain the facts in regard to the title to the wood, and Stadtmuller had informed them that he had no claim upon the wood, and that the title thereto was in Dixon and Bertrand, then some of the numerous authorities cited by appellant's counsel would have been applicable. But the proofs are that the declarations were made to Dixon and Bertrand, who knew all the facts just as well as Stadtmuller. They knew that the legal title was in Stadtmuller; that his remarks were made without consideration, and did not amount to either a gift or sale of the wood to them, and did not authorize them to sell or convey the same to any one. (*Cummings v. Webster*, 43 Me. 192; *Lewis v. Custleman*, 27 Tex. 408.)

3. The appellant Hawkins also claims the wood by virtue of certain tax titles.

Upon the trial, the court excluded the certificates of sale, and it was argued that this action of the court was erroneous. It appears from the recitals in the assessor's certificate of sale of the wood on the Simpson & Ward ranch, that the assessor, on the twenty-sixth day of May, 1876, duly listed and assessed to L. M. Buel, S. Dixon, F. D. Stadtmuller, S. Simpson and O. W. Ward, two thousand cords of wood, at two dollars and fifty cents per cord, and ten thousand feet of lumber, at fifteen dollars per thousand; that the assessor, on the said twenty-sixth day of May, advertised the property for sale, by posting written notices, signed by him, in three public places in Alpine county; that on the third day of June, 1876, the assessor offered at public auction "so much of said property as would be sufficient to raise said sum of money so due for said taxes;" that "D. R. Hawkins bid the smallest or least quantity of said personal property and pay said taxes and costs, to wit: one hundred and fifty-one dollars and ninety-two cents taxes and one dollar and fifty-one

cents costs; that the smallest quantity bid or offered to be taken by said D. R. Hawkins, and pay said taxes and costs, was the whole of said cord-wood; that the whole of said cord-wood was by" the assessor "then and there struck off and sold to said D. R. Hawkins, he being the best bidder therefor."

Similar recitations appear in the certificate of sale from the assessor to S. W. Griffith, for eight hundred and fifty cords of wood and five thousand one hundred and eighty feet of lumber, on the St. John ranch, assessed to L. Bertrand, S. Simpson, O. W. Ward and F. Stadtmuller. The certificates were signed "A. M. Grover, assessor of Alpine county; Henry H. Merrill, deputy."

Appellants offered testimony to prove that Grover was assessor, but failed to make any proof whatever that Merrill was his deputy, or that the signature to the certificate of sale was the signature of the officer making it. These facts were essential, in order to give validity to the certificates. (Blackwell on Tax Titles, 92, 217; *Rockbold v. Barnes*, 2 Rand, 473.)

In California, it has been held that the supreme court should take judicial notice of the fact as to who fills the various county offices within their jurisdiction, and of the genuineness of their signatures. (*Wetherbee v. Dunn*, 32 Cal. 106.) But our attention has not been called to any authority, and we apprehend none can be found that requires the courts of one state to take judicial notice of the various county officers of another state, or the genuineness of their signatures. This objection was of itself sufficient to justify the ruling of the court in excluding the certificates of sale. Other objections were made by respondent, which, in our opinion, were equally well founded.

The law of California relating to the collection of taxes by the assessor on personal property, and authorizing a seizure and sale, where the owner has no real estate, provides, among other things, that "the sale must be at public auction, and of a sufficient amount of the property to pay the taxes, percentage and costs." (2 Cal. Political Code, 3791.) "3792. The sale must be made after one week's notice of

Opinion of the Court—Hawley, C. J.

the time and place thereof, given by publication in a newspaper in the county, or by posting it in three public places.” “3794. On payment of the price bid for any property sold, the delivery thereof, with a bill of sale, vests the title in the purchaser.”

Appellants failed to prove that these provisions of law were complied with. The property was not sold at “public auction,” in the manner required by section 3791. There is no satisfactory proof that it was necessary to sell the entire quantity of wood in order to pay the taxes, and we are of opinion that the wood ought to have been offered for sale by the cord, and only so much sold as was sufficient to pay the taxes, percentage and costs. (Cooley on Taxation, 344; Blackwell on Tax Titles, 286-289, and authorities there cited.)

Appellants’ counsel, having attempted, but failed, to prove that the notices of sale were posted in three public places, as required by section 3792, contend that the certificates of sale were conclusive evidence of the facts therein recited. This position is wholly untenable.

There are no provisions in the law of California—at least none that were offered in evidence—which makes the bill of sale of personal property even *prima facie* evidence of the facts recited in it. The law does not specify—as it does in regard to certificates of sale given by the officer upon the sale of real property—what shall be stated in the bill of sale. Section 3786 relates exclusively to sales of real estate. It is not made applicable to sales of personal property made by the assessor. (See sec. 3822.)

The law does not require the assessor, in selling personal property, to give a certificate of sale, but simply provides that upon the payment of the purchase-money he must deliver the property, “with a bill of sale.”

It is evident that if the court had permitted the certificates of sale to be introduced in evidence, the jury would have been compelled, under proper instructions, to disregard them, because the testimony, in several particulars, failed to show the essential facts required by law to give them any validity.

It is unnecessary to notice the various other objections made by respondent's counsel to the certificates of sale. It is sufficient to state, in general terms, that the fact that the property was levied upon and advertised for sale without any effort having been made by the assessor to notify the owners of the property, and that property assessed at over five thousand dollars was sold for one hundred and fifty dollars, shows the necessity of courts enforcing a strict compliance of the law. In cases like this, where the sales were made *ex parte*, without any regular proceedings in a court of justice, it is essential that each and every of the requirements of the law should be strictly observed by the officer exercising this summary power. The bare possibility that the power might be abused by the officer, and that injustice might be done to the owner, ought to require from the courts a strict construction of, and a literal compliance with, the law.

4. This brings us to the most important question involved in this case, viz: did the court err in giving the fifth instruction asked by respondent's counsel? It reads as follows: "If the jury find from the evidence that the wood in controversy was put into the wood-drive of the said defendant, the Carson river wood company, at Alpine county, state of California, by some person or persons having the custody or possession thereof, not the owner or owners thereof, the possession of such Carson river wood company of said wood was lawful until demand made by the owner or owners, and it was not until after demand was made on them by the owner or owners, and refusal to deliver it up, that any conversion took place, and an action for the recovery of the property, or for damages for its conversion, would lie by the owner; and the owner of the property is entitled to recover the value of the property converted at the time and place of such conversion."

The wood, at the time of the demand upon, and refusal by, the Carson river wood company, was out of the river and corded up at Empire city, in Ormsby county, in this state, and was then and there worth the sum of seven dollars per cord (the value found by the jury). The Carson river

wood company did not claim the wood as its property; but when the written demand was made upon it to deliver the possession to Ward, it refused, upon the ground "that the wood thereby claimed by O. W. Ward is also claimed by other persons or parties." The proofs show that the corporation was a mere bailee for the defendant Hawkins and others, and had no further interest in the wood except to secure its pay for services in driving and transporting the wood to Empire city. Its refusal to deliver the wood under such circumstances did not amount to a new conversion. Its liability was not fixed or determined by the time or place it came into possession of the property. It might have relieved itself from all liability to the plaintiff by delivering him the wood when it was demanded. By its act of refusal to deliver the wood when demanded it became liable to the plaintiff to the same extent that the defendant Hawkins, and his predecessors in interest, were liable, and no more. Hawkins, Griffith or Buel could only have been held liable (there being nothing in the case to warrant special or exemplary damages) for the value of the wood at the time and place of its conversion, with legal interest, from that date up to the time of judgment.

During the progress of the trial the defendants, having in their original answers admitted the value of the wood at Empire city to be five dollars and seventy-five cents per cord, were, on motion, allowed to amend their answers by alleging that the value of the wood, on the respective ranches where it was cut, was two dollars per cord, and no more. The testimony as to its value at that point varies from two dollars to three dollars per cord.

The proofs show that Hawkins, and his predecessors in interest, took possession of the wood upon said ranches, and at their own expense caused it to be removed therefrom and flumed down Wolf creek into the Carson river, claiming it as their own. The expenses so incurred by them, added to the amounts paid for the purchase of the wood, exceeded six thousand dollars. This does not include the amount of one dollar and fifty cents per cord due the Carson river wood company for driving and trans-

porting the wood down the Carson river to Empire. It is proper to state, in this connection, that the plaintiff, upon the cross-examination of Hawkins and other witnesses, sought to prove that there was a collusive agreement between Hawkins and the persons from whom he purchased the wood that the purchase-money, as evidenced by certain promissory notes, was not to be paid unless he finally recovered in this action. Nevertheless, the fact remains undisputed that the entire cost of removing the wood from the ranches in Alpine county, California, where it was cut, was either paid or incurred by the defendant Hawkins, and that its enhanced value was solely caused by the acts of Hawkins, and his predecessors in interest, in having it so removed, flumed, driven and transported to market at Empire city, Nevada. The plaintiff knew that the wood had been sold by Dixon and Bertrand, and that it was claimed by other parties, but took no steps to advise the purchasers of his title until the wood arrived at Empire. In his testimony on cross-examination he said: "I knew or heard when the drive was going to leave up there. I didn't go and look after the wood, because I heard it had been sold and that fighting men had been put in the camp to kill me if I came up." There is no pretense that Ward or Stadtmuller claimed any title to the wood or attempted, in any manner, to assert any dominion or control of it after the sale by Dixon and Bertrand until it arrived at Empire. The argument of respondent's counsel in support of the instructions given by the court, and of the measure of damages found by the jury, is based upon the theory that a demand was necessary, and that the demand and refusal, as proven in this case, fixed the date of the conversion of the property. This principle is often applied in actions against brokers to recover the value of mining stocks, etc., and a demand and refusal are sometimes proven in other cases for the purpose of showing the defendant's possession to be wrongful. But the proof of the demand and refusal is only one of the means that may be resorted to for the purpose of establishing the fact of a conversion. When there has been an actual conversion, no demand is necessary in order to sustain the

Opinion of the Court—Hawley, C. J.

action of trover. (*Carr v. Hemenway*, Davies, 328; *Earle v. Van Buren*, 2 Halsted, 344; *Davison v. Donadi*, 2 E. D. Smith, 121; *State v. Patten*, 49 Me. 383; *Hardy v. Keeler*, 56 Ills. 152.) The same rule prevails in actions of replevin. (*Perkins v. Barnes*, 3 Nev. 557.)

The taking of the wood by Hawkins and others, under the unauthorized sales, with the intent to convert it to their own use, amounted to a conversion, and the true owner of the wood could recover its value in an action of trover, without making any demand, notwithstanding the fact that they purchased the property in good faith, believing the title to be valid. (*Whitman G. & S. M. Co. v. Trille*, 4 Nev. 494.)

The wood, as it was piled upon the ranches in Alpine county, belonged to the plaintiff and his predecessors in interest. It was there wrongfully converted by the defendant Hawkins and his predecessors in interest. That was the place where the plaintiff's property was taken from him. After this conversion, the defendant Hawkins and his grantor, Griffith (claiming the wood as their own), delivered it in the Carson river to the defendant, the Carson river wood company, as their bailee. The Carson river wood company, as a bailee for Hawkins and Griffith, transported the wood down the Carson river to Empire city, where the plaintiff made the demand for the wood. The plaintiff is entitled to recover full compensation for the value of the property taken; but he is not entitled to recover the value as increased by the labor and expenditure of money upon the part of the defendant Hawkins or any of his predecessors in interest. This would certainly be giving him complete indemnity for the loss he sustained, which is the real object of the action of trover. (*Boylan v. Huguet*, 8 Nev. 358, as well as in replevin, where the property cannot be returned; *Buckley v. Buckley*, 12 Nev. 424, and authorities there cited.) There is nothing in this case, calling for any special or exemplary damages, and hence the true measure of damages which the plaintiff was entitled to recover, was the value of the wood at the time of the conversion, with legal interest from that date up to judgment.

Opinion of the Court—Hawley, C. J.

(*Boylan v. Huguet, supra; Weymouth v. Chicago and Northwestern Railway Company*, 17 Wis. 554; *Moody v. Whitney*, 38 Me. 174; *Bourne v. Ashley*, 1 Lowell, 27; *Winchester v. Craig*, 33 Mich. 207.) There may be cases imagined that might require a modification of this rule, in order to reach the controlling principle of compensation; for it has been often said that the rule always yields, when the facts require it, to the principle upon which the rule is founded.

But “sufficient unto the day is the evil thereof,” and it will be time enough to decide such cases when they are presented. It is enough for us here to say that, in our judgment, there are no facts in this case that call for any modification of the rule. The rule adopted, if properly applied, does give the plaintiff full compensation.

In the case cited from Wisconsin, the plaintiff had caused wood to be cut, and had piled it on the premises of the defendant, in the town of Farmington, in Jefferson county, with a view of selling it to the defendant. At that place the wood was worth about one dollar and fifty cents per cord. Before the contract was completed, the defendant, by mistake, carried the wood to Janesville, and there mingled it in such a manner that its identity was lost. The plaintiff then demanded it at Janesville, and the defendant did not deliver it. Wood at that time was worth four dollars per cord in Janesville, and was afterwards worth five dollars. The plaintiff brought an action of trover to recover the value of the wood, and the question was whether the plaintiff should recover its value at Janesville, or only the value at Farmington, where it was first taken. Paine, J., on delivering the opinion of the court, after admitting that a wrong-doer cannot, by bestowing labor upon the property of another, which he has tortiously taken, divest the title of the original owner, and that the owner may retake it in whatever form it may be found, so long as its identity can be established, said: “But where the owner voluntarily waives the right to reclaim the property itself, and sues for the damages, the difficulty of separating the enhanced value from the original value, no longer exists. It is then entirely practicable to give the owner the entire

Opinion of the Court—Hawley, C. J.

value that was taken from him, which certainly seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption, the law does not allow it, because it is absolute justice that the original owner should have the additional value, but because the wrong-doer has, by his own act, created a state of facts where either he or the owner must lose something. There the law says the wrong-doer shall lose. But if the owner chooses to resort to another remedy, in applying which the law may give him full compensation for all that he has lost, without compelling the wrong-doer to pay more, I see no reason why that should not be the rule. The value of the property at the moment of the conversion, without such increase as it may have received from fluctuations of the market, or other causes independent of the acts of the defendant, should be the measure of the damages."

We are of opinion that the authorities cited by respondents' counsel, which hold that the measure of damages should include the enhanced value of the property, merely because the owner might, in an action of replevin, have recovered it in specie, are not supported by sound reason nor sustained by the weight of the decided cases; and hence they ought not to be followed by this court.

The judgment of the district court is reversed, and the cause remanded for a new trial, unless the respondent elects, within ten days after the filing of the remittitur herein in the district court, to have the judgment modified so as to include only the value of the one thousand eight hundred and sixty-two cords of wood, at two dollars per cord, with legal interest on such value from the time of the conversion of the wood from the ranches in Alpine county, California (said judgment to be for gold coin of the United States), in which event the judgment, as thus modified, will be affirmed. Appellants are entitled to recover their costs on appeal.

[No. 834.]

**ALEXANDER D. SMITH, APPELLANT, v. ALEXANDER
B. STEWART ET AL., RESPONDENTS.**13 65
15 425

HOMESTEAD—WHAT IT INCLUDES.—In construing the homestead law of 1865: *Held*, that a town lot upon which is erected a dwelling-house, two other buildings used as stores, and a stone house for storing goods, the buildings being separate from each other, can be claimed and held as a homestead; that the law exempts from execution a tract of land on which the homestead is located, to the extent of five thousand dollars in value, without limiting the other uses to which the land is put, as long as it is used and claimed as a homestead.

APPEAL from the District Court of the Third Judicial District, Lyon county.

The facts appear in the opinion.

Lewis & Deal, for appellant.

Boisot's homestead only embraced the land upon which his dwelling-house stood, the dwelling-house and out-buildings used in connection with it, necessary to the proper enjoyment of the dwelling itself. The primary object of the legislature is to exempt a homestead, that is the dwelling-place of the family, and not simply property to the value of five thousand dollars. (*Gregg v. Bostwick*, 33 Cal. 225; *Estate of Delaney*, 37 Id. 176.)

The decision in *Clark v. Shannon*, 1 Nev. 569, was based upon sections 4, 5, 6, 7 of the act of 1861. That act is in many respects essentially different from the act of 1864-5.

C. H. Belknap and Kirkpatrick & Stephens, for respondents.

The entire premises embraced by Boisot's homestead claim was homestead property. (1 Comp. L. 186 *et seq.*; *Goldman v. Clark*, 1 Nev. 607; *Clark v. Shannon*, 1 Id. 568; *Kelly v. Baker*, 10 Minn. 154; Stats. of Minnesota, 498; *Ackley v. Chamberlain*, 16 Cal. 181.)

By the Court, LEONARD, J.:

On the twenty-eighth day of October, 1875, one William Rogan recovered judgment in the third judicial district

Opinion of the Court—Leonard, J.

court, Lyon county, in this state, against Charles V. Boisot, which was duly docketed on the same day. On the thirtieth day of October following, execution was duly issued thereon, and the property described in the complaint in this action was levied on, and on the twenty-ninth day of January, 1876, sold to said Rogan. There was no redemption of any portion of the premises, and on the thirty-first day of July, 1876, the sheriff executed and delivered to Rogan a deed conveying the same to him. On the day last stated, Rogan, for a valuable consideration, conveyed the premises to appellant. On the seventh day of November, 1874, W. M. Seawell, judge of the third judicial district court before mentioned, and trustee under the act of the legislature of this State, entitled, "An act prescribing rules and regulations arising under the act of Congress entitled, 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2, 1867; approved February 20, 1869," as such judge and trustee, conveyed the premises in controversy to said Boisot, who, on the eleventh day of November, 1874, made his declaration of homestead in writing, claiming the said premises as a homestead, and caused the same to be recorded on the thirteenth day of November following, in the office of the county recorder of said Lyon county, wherein the premises are situated. At the time of making his declaration, Boisot was, and ever since has been, a married man, and at such time, and up to December 1, 1875, he resided with his family upon said premises, using the dwelling-house thereon as his family residence. The property in controversy consists of a lot of land on Main street, in Silver city, about forty-nine by one hundred and thirty-seven feet, whereon there is the said dwelling-house and two buildings used as stores, and a stone house used for storing goods. The two stores are on Main street, and the stone house is in the rear of the stores, all being separated from each other and from the dwelling-house. There is an alley-way about two and a half feet wide between the two stores, which is used in reaching the dwelling-house in the rear of the stores, and there is a stone wall behind the two stores for

Opinion of the Court—Leonard, J.

the support of a bank of earth in the rear, making a terrace of the ground upon which the dwelling-house stands. There are, and have been, no fences dividing the dwelling-house from the other buildings. Boisot and family never used the stores on Main street or the stone house in the rear, as a dwelling-house, but while occupying the dwelling-house with his family, he used the two stores as places wherein he sold goods and carried on other business, and the stone house as a place for storing goods. In one of the stores Boisot carried on business as a broker and druggist, until about October 14, 1875, defendant Stewart having been his partner in the drug business from August 1 until October 14, 1875, when the partnership terminated. In the other store Boisot and defendant Gowen carried on the tobacco and variety business, as partners, the latter having assumed the management in consideration of the partnership, using the store without paying much rent. This partnership continued from some time in July until October 9, 1875, and thereafter Gowen carried on the business in the same store on his own account, but it does not appear that he paid Boisot any rent. All the buildings and improvements mentioned were, at the time of making the homestead declaration, and now are, on said lot. The whole premises, including the land and buildings, have always been, and now are, worth less than five thousand dollars. Some time after said judgment was docketed, to wit: about November 8, 1875, Boisot and wife duly conveyed the whole property to Samuel Heitscher. This conveyance was recorded in the office of the county recorder of Lyon county, November 19, 1875. Heitscher leased the premises to respondents November 19, 1875, and they are in possession as his tenants. The value of the rents since July 31, 1876, the date of appellant's deed from the sheriff, until judgment in this case was ninety-five dollars per month.

As conclusions of law, the court found that no part of the premises described in plaintiff's complaint was subject to sale under his execution, for the reason that they were all homestead property of said Boisot and wife, the grantors of defendants' lessor; that plaintiff was not entitled to recover either possession or rents.

Judgment was entered accordingly, and this appeal is taken therefrom.

The only question for our consideration is as to the extent of Boisot's homestead. Counsel for appellant claim that it only embraced the dwelling-house and the out-buildings and appurtenances used immediately in connection therewith, together with the land upon which they stand; while respondents' counsel contend that it included the whole property described in Boisot's declaration of homestead, which is the same as that described in the sheriff's deed and in the complaint in this action.

Counsel for appellant admit the correctness of the decision in the case of *Clark v. Shannon* (1 Nev. 569), under the statute of 1861, but urge that under the statute of 1864-5 a different rule must prevail. We shall examine that case in connection with both statutes, with the view of ascertaining whether or not there is such a difference between the two statutes as to work the radical change claimed by counsel for appellant. Homestead exemptions as to extent and character, depend entirely upon the constitution and statutes. They were unknown under the common law. The constitutions and statutes of the different states being unlike ours, as a rule, the decisions of other courts upon the subject in hand furnish few authorities that can be followed here.

The case of *Gregg v. Bostwick*, 33 Cal. 225, referred to and greatly relied on by counsel for appellant, was rendered when the statute of that state in relation to homestead exemptions was like ours. We shall examine that case hereafter.

It is said by counsel for appellant in their brief, "that all the sections of the act of 1861, upon which *Clark v. Shannon* was decided, are left out of the act of 1864-5," and hence it is claimed that the case referred to is not an authority in this case. If the premises assumed by counsel are correct, their conclusions certainly follow; because respondents' rights depend upon the last named statute, and that decision was based upon the statute of 1861, although *Clark v. Shannon*, and *Goldman v. Clark* (1 Nev. 607), were

Opinion of the Court—Leonard, J.

rendered more than eight months after the statute of 1864-5 was in force.

It is also said by counsel for appellant, that the legislature of 1864-5 left out certain provisions of the act of 1861 for the purpose of avoiding the construction adopted in *Clark v. Shannon*. If such are the facts, it is the duty of this court to so declare. A comparison of the two statutes will best show the intention of the legislature. It may be well to notice preliminarily, however, that at the session of the legislature of 1864-5 the constitution of this state was in force, and that section 30, article iv, required laws to be enacted providing for the recording of homesteads within the county in which the same should be situated. Such provision was made in section 1, statute of 1864-5. In the same law nearly all the provisions of the old law were re-enacted; but those seeming to allow the execution debtor to claim at least one acre, although of greater value than five thousand dollars, were left out of the new law, and with good reason. They were inconsistent with section 1. They made an important and oftentimes unnecessary distinction between one person owning an acre and another owning more, although the property of each was worth more than five thousand dollars. The estate of the latter could be divided so as to deprive the owner of a greater portion of his last acre, if the balance was worth five thousand dollars, while the former could hold a full acre, except in case of sale of the whole. If a homestead exceeded one acre, and the land and dwelling-house and appurtenances thereon were worth more than five thousand dollars, a portion less than an acre in compact form might have been set off as the homestead, if that portion, with the dwelling-house, etc., was worth five thousand dollars; but if a homestead did not exceed an acre, although that acre, with the dwelling-house, etc., was of greater value than five thousand dollars, the portion representing the excess of five thousand dollars in value could not be sold, and the only remedy of the plaintiff was to sell the whole, and take the balance of the proceeds of the sale, after paying the defendant five thousand dollars. Thus it will be seen that the statute of 1861 made a useless,

unjust distinction between homestead claimants. We think the facts just stated caused the legislature to change the law of 1861 in 1864-5. We think further, that if the legislature had intended to make the radical change claimed by counsel for appellant, such intention would have been made plain; the language of the first section defining a homestead, would have been changed so as to show the intended modification. They would not have re-enacted the significant words: "The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, * * * shall not be subject to forced sale on execution." Section 1 of the statute of 1861 did not specify the time or manner of selecting a homestead, and section 3 provided that the householder might notify the officer of what he regarded as his homestead at the time of making the levy, and that the remainder alone should be subject to sale. Section 1 of the law of 1864-5 does require the selection to be made in a certain way, and it is nowhere stated that it may be done in any other manner or at any time after levy. But in *Hawthorne and wife v. Smith* (3 Nev. 185), this court decided that property which possesses the characteristics of a homestead, may be selected and the declaration recorded, any time before sale under execution, and that the levy of an attachment will not prevent such selection.

So the only practical difference between sections 1 and 3 of the old law and section 1 of the new is, that the latter requires a declaration in writing containing the facts therein mentioned, to be acknowledged and recorded in the proper office sometime before sale, and the former do not contain this requirement.

Section 2 of each statute does not affect the question under consideration.

Sections 4 and 5 of the old law are embodied, substantially, in section 3 of the new, with the exception of the "one acre" provisions already referred to. In the present statute there is a new provision, "that when the execution is against the husband whose wife is living, the judge may,

in his discretion, direct the five thousand dollars to be deposited in court, to be paid out only upon the joint receipt of the husband and wife, and it shall possess all the protection against legal process and voluntary disposition of the husband as were the original homestead premises."

An impartial examination of the two statutes has convinced us that the legislature did not intend to change the policy of the former law in relation to the character and extent of homestead exemptions, and that is the principal question in this case, if not the only one.

In *Clark v. Shannon*, the defendant was residing upon lot four in a certain block in Washoe city, and on lot three in the same block, and immediately adjoining, he had a livery stable. The two lots made a square of one hundred feet. He executed a promissory note to plaintiff Clark for eight hundred dollars, and at the same time executed a mortgage to him on lot three, to secure its payment. Shannon was conducting his livery business on lot three, and his wife was living with him on lot four. Soon after the execution of the mortgage, Shannon filed in the proper office his declaration of homestead, including in the premises described both lots three and four; and after the passage of the present law providing for the registration of homestead claims, he had his declaration recorded. Clark filed his bill to foreclose his mortgage on lot three, and Shannon resisted the decree, on the ground that when he executed the mortgage the stable lot constituted a part of the homestead property, and was not bound by a mortgage in which his wife did not join. The only question raised in the court below, and the controlling one in this court, was, whether, under the circumstances of the case, the stable lot constituted a part of the homestead property. The court below held that the homestead was confined to the lot on which the dwelling-house was situated, and did not include a separate lot which was devoted to business purposes. This court, on appeal, held that the stable lot was a part of the homestead, and was exempt from execution, and also from the operation of the mortgage executed without the concurrence of the wife. Counsel for appellant say that "the old statute seemed to

Opinion of the Court—Leonard, J.

contemplate the selection of the debtor of one acre of land, even if the dwelling was not on it." We think counsel are plainly in error. Under both statutes it is "the homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars," that is exempt; and under both, if property is selected which is not a part of the homestead, it may be sold. When section 3 of the statute of 1861 provided that if a levy was made upon the lands or tenements of a householder whose homestead had not been selected and set apart, he might notify the officer * * * of what he regarded his homestead, * * * and the remainder alone should be subject to sale under such levy, it meant only that no property so selected should be sold, provided it was such as could be selected, and was exempt, as a homestead. It did not mean that other property should not be sold, although it was claimed and selected as a homestead. It was homestead property to the extent of five thousand dollars in value, and no other, that he had the right to select, and which the law protected. It was an unlimited quantity of land upon which the dwelling-house stood, the whole not exceeding the specified value, that was exempt, and all other lands were subject to sale then as they are now.

In *Clark v. Shannon*, after stating the substance of sections 1 and 3, the court say: "If the owner sets apart property worth more than five thousand dollars, steps may be taken by the plaintiff in execution to appraise the property, and either sell a portion thereof or sell the whole, reserving five thousand dollars of the proceeds for the debtor. It is also provided that no division of the homestead property shall be made without the assent of the owner, where it consists of one acre or less. 'Here, then, is the privilege to the debtor of selecting any land included in the homestead tract, provided it does not exceed five thousand dollars in value. There is no qualification as to the uses to which it may be applied.'"

It is difficult to see how the conclusion of the court expressed in the sentence quoted by us was at all dependent

Opinion of the Court—Leonard, J.

upon the sentence immediately preceding, having reference to the "one acre" provisions of the statute of 1861. That conclusion applied to all homesteads, including those worth less than five thousand dollars; and yet the "one acre" provision did not take effect unless the property claimed was worth more than five thousand dollars. If the property was of homestead character, and was of less value than five thousand dollars, it could have been claimed and held as a homestead, whether there was one acre or more or less.

The most that can be said of the "one acre" provision is, that if a homestead happened to contain no more than one acre, and was worth more than five thousand dollars, the quantity in excess of five thousand dollars in value could not be sold, and the creditor was compelled to sell the whole. But we fail to see how the elimination of those useless, unjust provisions in any manner influenced the court in arriving at their conclusions upon the general policy of the law.

The court says, further: "Had the lots been levied on, can there be any doubt but that the defendant, Shannon, might have notified the sheriff that he claimed them as a homestead? If he had done so, it appears to us they could not have been divided. It is admitted both together are of less value than five thousand dollars. Both together contain less than an acre."

Why could it not have been divided? Because it was a part of the homestead, as well as because there was less than an acre, and in either case because it was worth less than five thousand dollars. If it was a part of the homestead, being of less value than five thousand dollars, no part could have been sold if the "one acre" provisions had not been in the law; and if it was not a portion of the homestead it could have been sold, because the homestead law did not apply to it. The fact is the court treated the stable lot as a part of the homestead, and having done so, the conclusion was irresistible that the mortgage could not become an incumbrance upon the property without the joint action of the wife, as required by law. We agree with counsel for appellant that property which does not possess

Opinion of the Court—Leonard, J.

a homestead character cannot be made such by filing a declaration claiming it as a homestead, and the same was true under the old law. If the stable lot was not a portion of the homestead, under the statute, it was idle to claim it and have it recorded as such. If it was a part of it, then claiming it and having it recorded secured its exemption; and it having been of less value than five thousand dollars, it was a matter of no consequence whether there was one acre or more or less. Had it been true that the stable lot could not be held as a part of the homestead because it was not appurtenant to the house, or because it was devoted to business purposes, certainly the court would not have held against the validity of the mortgage, either because there was less than an acre in the two lots, or because it was worth less than five thousand dollars; nor would it have said, as applicable to that case, that "the law seems to contemplate that the debtor shall not, under any circumstances, be compelled to accept less than one acre of land for his homestead, although half that quantity might be worth five thousand dollars."

Having treated the stable lot as a part of the homestead, the court stated as an additional reason for its decision against the plaintiff, that the defendant had the right to claim at least an acre, if the whole was of less value than five thousand dollars, and therefore the property could not be divided. We think the decision of the court did not in any manner necessarily depend upon the "one acre" provisions of the statute of 1861. The present statute, in all essentials showing the policy of the legislature, is the same as that of 1861. Section 1, in stating what a homestead shall consist of, is precisely the same in both laws, and the provisions requiring five thousand dollars to be paid to the debtor in case of sale of the homestead property, is the same in both. In the present statute, the claimant is required to insert in his declaration, among other things, that "it is his intention to use and claim the same as a homestead;" but how he shall use it "as a homestead," depends upon the statutory definition of that word, the uses required by the act, and the property that can be held as such. The

Opinion of the Court—Leonard J.

statute requires him to use it as a homestead, but allows him to select any quantity of land upon which his dwelling-house stands, if the whole does not exceed five thousand dollars in value. If a man with his family owns and resides upon a ranch of five hundred acres, and uses it in the ordinary way for the purposes of profit, he can hold the whole, with the house and barns thereon; if the whole property is within the maximum limit as to value. Shannon, in *Clark v. Shannon*, used the stable for the purposes for which it is built. In our opinion, any property which, as used, is exempt as a homestead, is "used as a homestead," and that any property which was exempt under the old law is equally so under the present statute. We do not think the legislature intended to exempt simply the dwelling-house with its necessary or convenient appurtenances. It is not more necessary to favor a family with shelter than their bodies with clothes, and their stomachs with food. The legislature did not intend to exempt five thousand dollars, as so much money, but the intention was, in our opinion, to protect that amount of realty if it is in one body, and altogether it makes up what is home. And the law-makers intended to treat all alike who are entitled to this favor. They told the farmer that he should be protected against the forced sale of his ranch and his house and barns, so long as the whole are not worth more than five thousand dollars. If to-day, his modest house and a few acres of land are worth no more than one thousand dollars, he is assured that if he will practice industry and economy, and thereby save four thousand dollars more, he can, with that, purchase additional lands, or enlarge his house, or do both, and in either case his property cannot be taken from him, nor can he dispose of it without the joint deed of himself and wife. Shall it be said then, unless the law compels the confession, that an industrious mechanic who owns a town lot upon which is his cheap dwelling, cannot invest his savings in a shop upon another portion of the lot, and call to his aid steam or water power, if he does not pass the five-thousand-dollar limit, without losing the law's protection, not only as to the shop, but even the land

Opinion of the Court—Leonard, J.

upon which it stands? The shop is in fact a part of the home place, and as important a part as the house itself. The land upon which it is built is a part of the house lot, and the dedication of that to homestead uses carries with it the tenements and hereditaments thereon. (C. L. 302.) In some states, where the quantity of land allowed as a homestead has been limited by law, but the value has been left unlimited, the courts have felt it their duty to construe the law as favorably as possible to creditors, for the reason that in such cases a dishonest debtor can enhance the value of his property to an unlimited extent, and still hold it from his creditors. But where the value is limited, as in this state, such danger does not exist. Besides, the exemption does not extend to any vendor's, mechanic's or laborer's lien.

Counsel for appellant assert that the language of section 1 of the present law clearly shows that no building can be claimed as a homestead, except the residence and its appurtenances, for the reason that the legislature has expressed the dwelling-house as exempt, and such expression excludes all other buildings.

When counsel brought this action they described the land claimed by plaintiff by metes and bounds, but they did not describe or mention any of the buildings thereon, for the reason that a judgment for the land would carry the buildings. So, in the statute, an exemption of a "quantity of land" would exempt the buildings thereon also; but the legislature did not intend to exempt any lands except those that are impressed with the homestead character, that is to say, those upon which the dwelling-house is situated. We think the reason why the dwelling-house was mentioned, was for the purpose of fixing the locus and extent of the exempted property, including the dwelling, etc., and that in mentioning that building the legislature did not intend to exclude others, except for the reason that they are not a part of the homestead.

Counsel refer us to *Gregg v. Bostwick*, 33 Cal. 220, and other cases from that state which follow the decision named. Our present homestead act is like the one in force there,

Opinion of the Court—Leonard, J.

when that decision was rendered, and we are urged to adopt the reasoning and policy of that opinion in this case, "as we have no decisions of our own giving the law a different construction." That decision was not rendered until after the passage of our present law, nor until after the decision of this court in *Clark v. Shannon*. So if our law was copied from the California statute, there is no presumption that the construction subsequently given to it by the supreme court of that state was adopted by our legislature. Although that case differs very materially from this, as will be seen from an examination of the findings, and although we agree with much of the reasoning of that court and many of its conclusions, we can by no means adopt it as a whole, for two reasons: first, should we do so, we should overthrow the adjudications of this court acquiesced in for a period of twelve years as to the true policy of the homestead law, and under which property and property rights have been acquired; for no impartial reader can conclude, after examination, that heads of families, under the present law, are deprived of any of the privileges that were granted to them under the former statute. Second, we are satisfied with the construction given to the law by our predecessors. Appellant's construction would strip every ranchman of his land outside of that upon which his dwelling and its appurtenances are situated, because his farming lands are not more "necessary or convenient," for home purposes, than are the stores to respondents in this case. The farm lands and barns are surely convenient and necessary; they assist in the support of the family; but they are neither, in the sense of the word "homestead," as used by counsel for appellant; they are neither, for the purpose of affording a family shelter; but they are both, as we think, when used in the sense intended by the legislature, as interpreted in *Clark v. Shannon*.

The judgment of the court below is affirmed.

Argument for Respondent.

[No. 840.]

E. C. GOOCH ET AL., APPELLANTS, v. JAMES SULLIVAN
ET AL., RESPONDENTS.

OBJECTIONS TO EVIDENCE—WHERE AND HOW MADE.—The supreme court, on appeal, will consider objections to the admission of evidence, only upon the grounds of objection as specified in the court below.

PAROL LICENSE—WHEN ENFORCED.—A parol agreement to construct a ditch and keep it in repair, for the mutual benefit of several parties, will be enforced, if the parties have, in pursuance of such agreement, performed labor and paid their share of the expenses incurred in the construction of the ditch.

APPEAL from the District Court, Second Judicial District, Washoe county.

Wm. Cain, for Appellant.

Admitting that the relation existing between plaintiffs and defendants are those of licensors and licensees, then, under the evidence in the case, the license granted is executed, and is not revocable at the pleasure of the licensor. (*Rerrick v. Kern*, 14 Serg. & R. 267; *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, 19 Id. 368; *Woodbury v. Parshley*, 7 N. H. 237; *Ameriscoggin Bridge v. Bragg*, 11 Id. 103; *Russell v. Hubbard*, 59 Ill. 335.)

Under a plea of right to the possession of the land the plaintiffs may prove any fact which entitles them to the possession. (*Gillespie v. Jones*, 47 Cal. 263.) But the parties were tenants in common of said ditch, and not strangers to each other, as in the case of licensor and licensee, and they mutually agreed to make and construct the ditch for their joint use and benefit.

Thomas E. Haydon, for Respondent.

I. This is a claim to use perpetually, for temporary purposes, a strip of land, without a written conveyance, in the teeth of the statute of frauds. (1 Comp. Laws, 55; *Lobdell v. Hall*, 3 Nev. 509; *Vansickle v. Haines*, 7 Nev. 249.

II. An estoppel must be expressly and precisely alleged. (*Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Guild v. Richardson*, 6 Pick. (Mass.) 364; *Crandall v. Gallup*, 12

Opinion of the Court—Leonard J.

Conn. 365; *Howard v. Mitchell*, 14 Mass. 241; *Isaacs v. Clark*, 12 Vt. 692; *Woodhouse v. Williams*, 3 Dev. (N. C.), 508; *McNair v. O'Fallon*, 8 Mo. 188; *Sharon v. Minnock*, 6 Nev. 386; Bigelow on Estoppel, 535, 536, note 1; *Hamlin v. Hamlin*, 19 Maine, 141; *Bolling v. Petersburg*, 3 Rand, 563; *Heard v. Hall*, 16 Pick. 460; *Marshall v. Pierce*, 12 N. H. 127.

W. M. Boardman, also for Respondent.

By the Court, LEONARD, J.:

This case is, in many respects, like *Lee et al. v. McLeod*, 12 Nev. 280. Plaintiffs seek to recover an undivided seven sixteenths part of a certain water-ditch described in their complaint, alleged to have been constructed from a tail-race of the Nevada Land and Mining Company over the lands of plaintiffs and defendants, for the purpose of conducting water from said tail-race to and upon the land of defendants and plaintiffs respectively, a distance of four or five miles, for farming and irrigating purposes. Plaintiffs also ask that defendants be perpetually enjoined from interfering with plaintiffs' free and undisturbed use of said ditch to the extent of their interest therein, and that plaintiffs have judgment for damages in the sum of one thousand five hundred dollars, on account of an unlawful diversion of the waters of said ditch, on and after May 20, 1876, until the twelfth day of August, 1876, when this action was commenced. Defendants were enjoined from interfering with plaintiffs' alleged rights in said water-ditch; also from diverting therefrom any portion of one hundred and forty-five inches of water, claimed to have been purchased from said Nevada Land and Mining Company for the irrigating season of 1876 by plaintiffs.

Defendants answered separately, and denied all the allegations of the complaint that are material on this appeal, except the allegation "that the ditch in question was constructed and used for the purpose of conducting water from said tail-race to the lands of plaintiffs and defendants, for farming and irrigating purposes, and is capable of conduct-

Opinion of the Court—Leonard, J.

ing from five to six hundred inches of water." Defendants also admitted, by failing to deny the same, that plaintiffs purchased the use of one hundred and forty-five inches of water from the Nevada Land and Mining Company, to be conducted through said ditch and used for irrigating purposes upon their ranches on and after July 4, 1876, during the farming season of that year; and further, that they, the defendants, diverted the water claimed by plaintiffs, but they denied plaintiffs' alleged right and title to the ditch or any of the water therein.

It was agreed by counsel upon the trial, and so ordered by the court, that plaintiffs might offer all evidence which they had or could procure to maintain or establish the right claimed by them, subject to defendant's objection, that such rights could be established only by deed or proper instrument in writing, vesting the same in plaintiffs or their grantors; that all evidence offered by plaintiffs, except such written evidence, should be taken under such objection, and the court should decide upon the same after plaintiffs should rest their case. Thereupon plaintiffs introduced evidence tending to establish these facts: That plaintiffs and defendants respectively own and cultivate ranches near the town of Reno, through and over which the ditch in question was constructed by defendants' and plaintiffs' grantors in the year 1868 or thereabouts, for the purpose of conducting to their lands for irrigating purposes waters running through the tail-race above mentioned, and belonging to the Nevada Land and Mining Company; that defendants' and plaintiffs' grantors, in 1868, agreed to construct and own the ditch together, for the purposes stated, and when it should be completed, to keep it in repair, defendants to own one fourth each, and plaintiffs' grantors one fourth each; that each of the parties to the agreement contributed his proportion of the labor and expenses necessary for its completion; that defendants, and plaintiffs, and their grantors, jointly kept it in repair, and until about May 20, 1876, used the same in common, according to their respective interests, without further permission or consent from the others; that the ditch is from four to five miles in

Opinion of the Court—Leonard, J.

length, and capable of conducting from five to six hundred inches of water; that defendants, prior to the date last mentioned, did not claim but an undivided one fourth interest each, and recognized plaintiffs' right to the balance; that in the year 1876 plaintiffs required water for use upon their respective ranches in their proper cultivation, and that in the spring of said year they purchased one hundred and forty-five inches of water, to be taken from the tail-race and used upon their lands for irrigating purposes during the irrigating season; that defendants deprived plaintiffs of the use of a great portion of the water so purchased by them, and thereby greatly injured their crops.

After plaintiffs had rested their case, defendants' counsel moved for a judgment of nonsuit upon the ground that the right claimed by plaintiffs, and by them sought to be enforced, was an estate or interest in the lands of defendants, other than a lease thereof, for a term not exceeding one year, and that the same was not created, granted, assigned, surrendered or declared by act or operation of law, or by deed or conveyance in writing, subscribed by the defendants or either of them, or by their lawful agents, etc. The motion was granted, and this appeal is taken from the judgment of nonsuit.

It is urged that, by their agreement and acts, respondents are estopped from denying appellant's alleged rights in the ditch in question. In answer to this, counsel for respondents reply that the facts necessary to constitute an equitable estoppel must be pleaded; that they are not in any manner stated in the complaint in this case, and consequently that appellants cannot invoke the principle claimed. We need not inquire whether it was necessary for appellants to plead such facts or not, for the reason that the only ground of objection to appellants' evidence was the one above stated. It was not objected that the evidence was inadmissible because the facts constituting an equitable estoppel were not pleaded. In *Sharon v. Minnock*, 6 Nev. 383, the court held that the ground of objection must be stated in the court below, and that this court would not reverse a ruling admitting or rejecting evidence upon a ground in no way suggested.

VOL. XIII.—6.

Opinion of the Court—Leonard, J.

gested at the time of objection, and upon which the court was not called upon to decide; that this court would consider objections only upon the grounds specified in the court below. Such a construction was evidently intended by the legislature, and is the only one that is just to courts and litigants. That parol evidence is admissible in general, to prove such an executed parol license as should be enforced in equity, requires no argument or citation of authorities. Any parol license which, if given and executed, will be upheld and enforced in equity, may be proven by parol. The fact that the license was in parol, excludes, as a rule, the possibility of proving it by evidence in writing.

The question for our consideration, then, is: Did the facts admitted in the pleadings and proven on the trial, the same being uncontradicted, entitle appellants to any relief sought in the court below? We think they did. They tended, at least, to establish an executed parol license in favor of appellants, which supplied the place of a writing and took the case out of the statute of frauds. The facts admitted and proven, if true, show that for the mutual benefit of respondents' and appellants' grantors, an agreement was by them entered into, jointly to construct the ditch in question for a common purpose; that in pursuance of such agreement and by reason thereof, they performed their proportion of labor and advanced their share of the expenditure necessary in its construction, and that subsequently appellants and their grantors contributed their share of labor and expense necessary in keeping it in proper condition for use; that at the time appellants were deprived of the water they had the right to use one hundred and forty-five inches from the tail-race mentioned during the whole irrigating season; that water was indispensable to the growth and maturity of their crops, and that by reason of its diversion their crops were injured; that appellants and their grantors, from 1868 until 1876, uninterruptedly used said ditch in proportion to the interests claimed by them respectively, and that during such period respondents did not claim but a fourth interest each therein. If the facts stated are true, respondents had no right to deprive appellants of the use of the ditch to the ex-

Opinion of the Court—Leonard, J.

tent of their interest; at least so long as the latter were able to purchase water from the owner of the said tail-race, and so long as they did so purchase it to be used upon their lands for irrigating purposes. (See *Lee et al. v. McLeod*, 12 Nev. 280, and the cases therein cited.)

In *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463, the court say: "Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

It is said by counsel for respondents that the ditch was intended for temporary purposes only. The evidence certainly does not show that such was the intention, and we cannot presume it to have been so from the character of the property and the surroundings of the parties. It is true the tail-race is not a natural stream, and that all the parties were obliged to purchase the water from its owner. But surely these facts did not justify respondents in depriving appellants of the use of the ditch so long as they were able to secure the water by purchase or otherwise.

We do not deem it important to consider other points raised by counsel for appellants.

The appellants will, if they so desire, be allowed, upon proper motion, to amend their complaint in such a manner that the case may be tried upon its merits.

The judgment of the district court is reversed and a new trial ordered.

Opinion of the Court—Beatty, J.

[No. 832.]

J. H. ALDERSON, APPELLANT, v. G. W. GILMORE ET AL., RESPONDENTS.

FINDINGS—NO PART OF THE RECORD.—The findings of the district judge cannot be considered on appeal, unless they are embodied in the statement of the case.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

George W. Baker, John T. Baker, and R. M. Clarke, for Appellant.

Thomas Wren, Crittenden Thornton, and Lansing & Baily, for Respondents.

By the Court, BEATTY, J.:

This is a suit to recover certain horses, mules, harness, wagons, etc., held by the defendant, Gilmore, sheriff of Eureka, under an attachment issued in an action commenced by the defendant, McKernan, against one Davis. The defendants, in their answers, deny plaintiff's title to the property, and allege that it is the property of Davis. The defendant, McKernan, also asserts a right to hold the horses and mules by virtue of a stable-keeper's lien for the price of hay, grain, etc., fed to them in his stables. These were the issues made by the pleadings. The cause was tried by the court without a jury, and the plaintiff had judgment for all the property except the horses and mules. Being dissatisfied with this judgment, he moved for a new trial, and on appeal from the order overruling his motion, he argues that the evidence was insufficient to support the findings, and that the findings do not support the conclusion of the district court, that the defendant, McKernan, had a valid lien upon the live stock. The plaintiff, however, neglected to include in his statement of the case the findings and conclusions of the court, and no counter statement was proposed. It is objected by the respondents

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| 13 | 84 |
| 18 | 396 |
| 18 | 30 |
| 1* | 828 |

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| 13 | 84 |
| 21 | 451 |
| 33* | 660 |

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| 13 | 84 |
| 24 | 440 |

Points decided.

that the findings of the district court are not a part of the record, and cannot be considered. We are obliged to sustain the objection. It has been too often decided to be any longer a question in this court that the findings of the district judge cannot be considered unless they are included in the statement of the case. (*Bowker v. Goodwin*, 7 Nev. 137; *Imperial S. M. Co. v. Barstow*, 5 Nev. 254; *Corbett v. Job*, Id. 204.) The objection that they are not a part of the record is not one of those exceptions to the transcript or technical objections to the statement that are waived unless taken in accordance with Rule VIII. of this court. We have no power to look outside of the record of a case, and when it clearly appears that a paper copied into the transcript is no part of the record, we are bound to ignore it.

Since, therefore, we cannot look at the findings in this case, we cannot know what were the grounds of the decision of the district court. If we should be satisfied from an examination of the statement on motion for a new trial that there was no evidence to sustain a finding that McKernan had a lien on the horses and mules, we would be bound to presume in favor of the judgment, that the finding was against the plaintiff on the issue of ownership of the animals. As the judgment and order of the district court must at all events be affirmed, it is unnecessary to consider or decide the questions discussed by counsel, which relate exclusively to the lien claimed by McKernan.

The judgment and order appealed from are affirmed.

[No. 827.]

MARTIN, FEUSIER ET AL., PETITIONERS, v. THE DISTRICT COURT OF THE FIRST DISTRICT, RESPONDENT.

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| 13 | 85 |
| 21 | 414 |
| 22 | 674 |
| 13 | 85 |
| 22 | 108 |
| 13 | 85 |
| 25 | 371 |
| 25 | 373 |

JUSTICE'S COURT—SUFFICIENCY OF COMPLAINT AND SUMMONS—An account was filed in the justice's court against "Irving, McKay & Co.;" the summons was returned served on "the defendants," and the judgment was entered by default: *Held*, that the complaint and summons were sufficient to sustain the judgment.

Argument for Respondents.

JURISDICTION ON APPEAL FROM JUSTICE'S COURT—JUDGMENT BY DEFAULT.—

No appeal lies from a judgment rendered by default in a justice's court. The district court can only retry issues of law or fact that were made in the justice's court.

APPLICATION for writ of *certiorari*.

The facts are stated in the opinion.

Drake & Gaston, for petitioners.

I. Under the rules of the common law it was necessary to specify the names of the defendants; but the statute sets aside the common law rule and provides that where several persons are associated under a common name, they may be sued by that common name. The district court therefore exceeded its authority, under the statute, in setting the rule aside. (1 Comp. Laws, 1658; *Gilman v. Cosgrove*, 22 Cal. 356; *Gillig, Mott & Co. v. Lake Bigler Co.*, 1 Nev. 214.)

II. The service of summons was sufficient. (1 Comp. Laws, 1658; *Wilson v. Spring Hill Q. M. Co.*, 10 Cal. 445; *Rowe v. Table M. Co.*, Id. 441; *Dorente v. Sullivan*, 7 Id. 279; *Hamilton v. McDonald*, 18 Id. 128.)

III. The justice had no power to grant the defendants' motion to vacate or set aside the judgment, nor could he exercise any control over the judgment, except to enforce it. (18 Wend. 558; 1 Hinton, 90; 2 Cowen's Treatise, 960; *Leonard v. Peacock*, 8 Nev. 84.)

IV. Justices are allowed great latitude. (1 Comp. Laws, 1597-1599; *Liening v. Gould*, 13 Cal. 598; *Linhart v. Buiff*, 11 Id. 280; *Grass Valley Quartz M. C. v. Stackhouse et al.*, 6 Id. 413; *Butler v. King*, 10 Id. 342.)

V. If the return were defective, it was demurrable only; and we were entitled to an amendment in accordance with the facts of service, as no rights or claims of others had intervened. (*Gavitt v. Doub*, 23 Cal. 78, and cases there cited.)

Lewis & Deal, for Respondents.

I. The complaint filed in the justice's court is not such a complaint as is authorized by the statute. The account filed as a complaint is not in form or substance such an

Argument for Respondents.

account as authorized by the statute. (1 Comp. Laws, 1595.) The account should disclose the names of the parties to the action. It does not appear from the paper filed who the defendants are. Messrs. Irving, McKay & Co. would indicate a copartnership name, but the names of the firm do not appear. The real names of the defendants should be given, or if a fictitious name is used, that fact should appear. (7 How. Pr. 271; *Frank v. Levei*, 5 Rob. 599.)

II. The summons issued by the justice of the peace was not such a summons as the statute required. The requirements of the statutes are mandatory. If the real name of the defendant is in the summons he is bound to take notice that an action is commenced against him, but if a fictitious name is used, and there is no statement to that effect in the summons, a person on whom service is made is not bound to take any notice of it. (*Pinda v. Black*, 4 How. Pr. 95; *Farnham v. Meredith*, 32 Barb. 277, 278; *Moullon v. De ma Carty*, 6 Rob. 470.)

III. The complaint must show that the conditions required by the statute existed. (*Welsh v. Kirkpatrick*, 30 Cal. 205.)

IV. The judgment was void, because the court never acquired jurisdiction of the defendants, no service having been made and the defendants not having waived service by an appearance. (*Hoffman v. Fish*, 18 Abb. Pr. 76; *Cole v. Hindson*, 6 Term R. 234; *Griswold v. Sedgwick*, 6 Cow. 456.)

V. On *certiorari* this court will only consider the question whether the inferior tribunal acted without its jurisdiction. (*Fall v. Co. Com. Humboldt Co.*, 6 Nev. 100; *Mason v. Co. Com. Ormsby Co.*, 7 Id. 398; *In re Wixom*, 12 Id. 219; *Ex parte Sweeny*, 12 Id. 158.) The district court having full jurisdiction of the case, had the power to make any order therein as fully as if the case had originally been commenced there. (*Morley v. Elkins*, 37 Cal. 454; *People v. Elkins*, 40 Id. 642; *Monreal v. Bush*, 46 Id. 79; *C. P. R. R. Co. v. Placer Co.*, 46 Id. 667.)

By the Court, BEATTY, J.:

The petitioners commenced an action in a justice's court of Storey county, by filing an account against "Irving, McKay & Co.," without disclosing the names of the individuals composing the firm. The summons thereupon issued was directed to "Irving, McKay & Co.," and according to the constable's return, was served on "the defendants" personally, in the township where the action was pending. The defendants having failed to appear, judgment was entered upon their default. Nearly a month thereafter, J. G. Irving and Daniel McKay appeared in the justice's court for the sole purpose of moving that the judgment be set aside. Their motion being overruled, they appealed to the district court, where it was renewed and granted, upon the grounds that the complaint was defective in form and substance, and that no legal summons had been issued or served.

We think the district judge was in error in so holding. The sufficiency of pleadings in justices' courts is not to be tested by the rules that are applied in the higher courts. The statute makes the copy of an account a sufficient complaint in justices' courts. (C. L., sections 1575 and 1595.) It is allowed to import allegations that must be expressly made in similar actions commenced in the district court. An account in the following form, "Daniel McKay to Louis Feusier, Dr., March 1, 1878, to 50 sacks of flour at \$2 50—\$125," would be equivalent, as a complaint in a justices' court, to the allegation that on the first day of March, 1878, Louis Feusier had sold and delivered to Daniel McKay, at his request, fifty sacks of flour reasonably worth one hundred and twenty-five dollars, and that the whole of that sum was at the date of the filing of the account due and unpaid. In other words, formal and precise pleading is dispensed with in those courts, and in an action upon an account everything is deemed to be alleged which can be reasonably inferred from the face of the paper. An account against "Irving, McKay & Co." just as fully imports the allegation that two or more persons are doing business under the firm name of Irving, McKay & Co., as that goods reasonably worth the amount charged were sold and delivered at their request.

Opinion of the Court—Beatty, J.

Where two or more persons are doing business under a common name, whether it comprises the names of such persons or not, they may be sued by their common name (C. L., sec. 1658), and in such case the individual names need not be disclosed, the very object of the statute being to dispense with the necessity of ascertaining the names of the members of the firm. Jurisdiction is acquired by serving the summons upon any one or more of the associates, but the judgment binds only their joint property, unless on the trial the names of the associates are shown, in which case judgment may be rendered against the individuals composing the company. (C. L., 1673; *Gillig, Mott & Co. v. Lake Bigler Road Co.*, 2 Nev. 214.)

It may be conceded that in an action under these provisions, in the district court, it would be necessary to allege that two or more persons were doing business under the firm name set out in the title of the complaint, but it does not follow that such express allegations are necessary in justices' courts. It is sufficient there if the facts can be inferred from the form of the account. This disposes of the objections to the complaint. The objection to the summons is, that it was not directed to the individual defendants by their proper names. We think it was properly directed to the defendants by their common name. The object of the statute, as we have said, was to enable the plaintiff to commence his suit without being under the necessity of first ascertaining the names of the several defendants, an object which would be completely frustrated by requiring the names to be ascertained before the issuance of summons. The name of the firm—which alone is to be bound, unless the names of the associates are proved at the trial—is known, and to that name the summons should be directed. (C. L., sec. 1577.) When it is served, the person upon whom it is served knows whether or not he is a member of the firm or company named. If he is not, he may safely disregard it; but if he is, he must answer, or take the consequences. In this case, if J. G. Irving and Daniel McKay were not members of a company doing business under the firm name of Irving, McKay & Co., the

Opinion of the Court—Beatty, J.

judgment did not concern them; if they were members of such a company, it was by their own default that the judgment was entered, and they have neither substantial nor technical grounds of complaint. Something has been said, it is true, about the insufficiency of the constable's return of service, but it is not denied that service was really made, and if the original return was defective it was cured by the affidavit subsequently filed. It is the service that gives jurisdiction; if the return is insufficient it may be amended in conformity with the facts.

But the important question in this case is not whether the district court erred in reversing and setting aside the judgment of the justice's court, but whether it exceeded its jurisdiction. The proceeding is by *certiorari*, and if the district court had the power on appeal to hear and determine the question whether the default of Irving, McKay & Co. had been improperly entered, then its order, no matter how erroneous, must stand.

We think, however, that the district court had no jurisdiction by appeal in this case. The judgment was entered upon the default of the defendants, and there was no issue of law or fact to be tried. All the district court can do in a case appealed from a justice's court is to try it anew (C. L., 1643), and if no sort of issue has been made or tried in the justice's court, there is nothing to be tried anew. (10 Cal. 19; 11 Id. 328.) These decisions were approved by Judge Brosnan (1 Nev. 96), and his decision has only been so far qualified as to hold that an appeal lies to this court from a judgment by default in the district court upon the question whether the default has been properly entered. (3 Nev. 385.) This is correct, no doubt, because this court, on appeal from a judgment, may review any question affecting its correctness or validity which can be raised upon the record.

But on appeal to the district court the case is different. All the district court can do is to retry issues of law or fact that have been made in the justice's court. If the defendant, by making the default, has failed to raise any sort of issue in the court of original jurisdiction, he will not be

Opinion of the Court—Beatty, J.

permitted to raise such issues for the first time in the appellate court. He cannot be allowed at his option to convert a court of appellate into a court of original jurisdiction.

If the defendant, in an action commenced in justice's court, thinks the complaint states no cause of action, he may object to it on that ground (C. L., 1597), and if he chooses he may stand upon that issue and appeal upon it, but if he does, it will be the only issue triable in the district court. If he wishes to make an issue of fact, he must make it in the justice's court, or he cannot have it tried in the district court.

It is contended that the last clause of section 1644 is a qualification of the provision of section 1643, that all causes appealed to the district court shall be tried anew. We do not think so. It is explained by reference to sections 1597, 1599, etc. Either party may desire to amend his own pleading, or compel an amendment of his adversary's, but if he failed to make his motion in the justice's court, he might be held to have waived the right to make it in the district court. It is accordingly provided that the justice shall enter in his docket a statement of all such motions and his decisions thereon. (C. L., section 1623.) If his decisions upon such motions are erroneous or arbitrary, the party aggrieved may renew his motion or objection in the district court. It is such and similar objections that we think are contemplated by section 1644, and if so, it is perfectly consistent with the provision of section 1643, requiring all cases appealed to the district court to be tried anew. This construction of the law does not leave a party who has been improperly defaulted without a remedy. His remedy by *certiorari* is ampler than it would be if he had the right of appeal, for he is not limited in the exercise of it to the period of thirty days; and if either party is dissatisfied with the judgment of the district court, an appeal lies to this court.

It is not contended in this case that there would have been any right of appeal to the district court if the defendants had not first made their motion to vacate the judgment

Argument for Appellants.

in the justice's court. But we think the making of that motion did not change the remedy. The wrong complained of was the entry of judgment without jurisdiction. If the wrong had existed, and if *certiorari* was the appropriate and exclusive remedy, as we think it was, a right of appeal was not created by the refusal of the justice to undo the supposed wrong.

Our opinion is that the order of the district court vacating and setting aside the judgment in favor of the petitioners against Irving, McKay & Co., and adjudging the petitioners to pay the costs of the appeal, was erroneous; and in excess of the jurisdiction of said court, and it is hereby declared to be null and void.

[No. 862.]

**VIRGINIA AND TRUCKEE RAILROAD COMPANY,
APPELLANTS, v. MICHAEL LYNCH, RESPONDENT.**

CONDEMNATION OF LAND, TITLE TO—RIGHT OF WAY—COMPENSATION.—

Lynch had the possessory title to certain land, including land that was laid down on the official maps of Virginia city, but never opened to the public as a street. The railroad company obtained from the city the right of way to lay its track upon said street, and in so doing excavated it in such a manner as to render the access to his dwelling-house difficult, and entirely destroyed a public road leading across said street to a quartz mill owned by him: *Held*, that it was immaterial whether the title in fee was in the United States or in Virginia city in trust for the public, that the prior possessory rights which Lynch had acquired by possession could not be destroyed by the railroad company without compensation.

APPEAL from the District Court, First Judicial District, Storey County.

The facts are stated in the opinion.

Whitman & Wood, for Appellants.

I. The petition was the proper proceeding in the premises. (*Spring Valley Water Works v. San Francisco*, 22 Cal. 442; *S. F. & S. J. R. R. Co. v. Mahoney*, 29 Cal. 118; 2 Comp. Laws, 3461, 3462.)

Argument for Appellants.

II. There can be no claim for compensation on the part of respondent as abutting lot owner, provided the use by appellant be a public use. (*Canal Trustees v. Haven, et al.*, 11 Ill. 554; *Moses et al. v. Pittsburgh R. R. Co.*, 21 Ill. 516; *New Albany & S. R. R. Co. v. O'Dailey*, 12 Ind. 551; *Milburn v. City of Cedar Rapids*, 12 Iowa, 247; *People v. Kerr*, 27 N. Y. 209; *Carson v. C. R. R. Co.*, 35 Cal. 325; *Severy v. C. P. R. R. Co.*, 51 Id. 194; *Ingram, Kennedy & Day v. C. D. & M. R. R. Co.*, 38 Iowa, 670; *Slatten v. Des Moines Valley R. R. Co.*, 29 Id. 152; *Gibson v. Mason*, 5 Nev. 283.)

III. The streets of the corporation are subject to the paramount authority of the state to regulate their use for the general purposes of the public good, and the legislature or the corporation may grant the use without compensation. (*Pierce Am. R. R. Law*, 184; *Philadelphia & Trenton R. R. Co.*, 6 Whar. 25; *Porter v. N. M. R. R. Co.*, 33 Mo. 128.)

IV. Even if the settlement under which respondent claims had been made with view to general pre-emption, which could not be under the laws of the United States (Rev. Statutes U. S. 417, sec. 2258), or other acquirement of the realty, the United States had the undoubted right to grant to another, no purchase having been consummated. (*Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley case*, 15 Id. 73.) Respondent could acquire no right by prescription against the government of the United States. (*Vansickle v. Haines*, 7 Nev. 249.) Nor could he against the city, even if the property were absolutely vested in it. (*Dillon on Municipal Corp.* secs. 529, 534; *Penny Pot. Landing v. City of Philadelphia*, 16 Pa. St. 94; *City of Philadelphia v. P. R. R.*, 58 Id. 263; *Henshaw v. Hunting*, 1 Gray, 203; *Hoadley v. San Francisco*, 50 Cal. 265.)

V. J. C. Clark, through whom respondent derives his claim, recognized the official map and claim of the city, by his application filed in the land-office. This estops his grantee to dispute the same. (*Bollo v. Navarro*, 33 Cal. 459; *Dickerson v. Chrisman*, 28 Mo. 134; *Roebke v. Andrews*, 26 Wis. 318.)

Opinion of the Court—Hawley, C. J.

Lewis & Deal, for Respondents.

I. The act of congress (Statutes of the United States, sec. 238), was never intended to embrace a city already built, with its streets laid out and built upon, and which is fully organized and incorporated. It is only the parties who have founded, or desire to found a town, that have any rights under the statute. Congress did not intend to give any parties the right to run streets through valuable and extensive improvements placed on the public lands in good faith without awarding compensation. Congress has never arbitrarily authorized any one to oust another from his possession, and to take from him his improvements without compensation, but on the contrary, it has always been the policy to protect all *bona fide* settlers, whether in the cities or upon the agricultural lands of the United States.

II. The statute of limitations runs against a municipal corporation. (5 Ohio St. 594; 8 Ohio, 299; Angell on Limitations, sec. 38; 2 Harris & McHenry, 137; Tyler on Ejectment, 126; 49 Mo. 468; 22 Id. 525; 24 Iowa, 283, and cases there cited; Compiled Laws of Nevada, secs. 1018, 1034.) The board of aldermen had no right to authorize the appellant to destroy the street. (7 Ind. 38; Id. 497; 31 Mo. 180.) The mere survey or platting does not make a street; it must actually be opened. (2 Wats. & S. 320; 7 Md. 500-516; 31 Cal. 554; Harrington's Ct. 98; 6 Mich. 176; 12 Id. 404.)

By the Court, HAWLEY, C. J.:

Appellant, pursuant to the provisions of the act entitled "an act to provide for the incorporation of railroad companies and the management of the affairs thereof and other matters relating thereto," approved March 22, 1865, petitioned the district court of Storey county for the condemnation of certain lands situate on H street, in Virginia city, for the purpose of enabling it to construct a side track and carry on its business for the accommodation of the public, and prayed for the appointment of commissioners to ascertain and assess the compensation for said land.

Petitioner, among other things, alleges that Michael Lynch "is now occupying and claims to own a portion of H street," and that said proposed side track "will pass through, over and across the portion of said street occupied and claimed by the defendant, Lynch."

The defendant, Lynch, in his answer alleges, among other things, "that he is the owner of a certain tract of land, including the ground sought to be condemned," and "that he and his predecessors in interest have been the owners of the said lot of land through which said H street passes for the past thirteen years."

Commissioners were regularly appointed, and after hearing the allegations and proofs of the respective parties they ascertained and assessed the compensation to be paid by the petitioner to the person or persons having or holding any right, title or interest therein at twelve thousand five hundred dollars. Their report was confirmed, and within twenty days thereafter petitioner deposited the money with the clerk, and then petitioned the court for an order directing the clerk to repay and return to it the said sum of twelve thousand five hundred dollars. The court denied this petition and ordered that said money be paid to respondent Lynch. From this order the appeal is taken.

From the statement in the transcript it appears that J. C. Clark, the immediate grantor of the respondent, in September, 1865, filed his declaration of settlement upon the land, in the land-office at Carson City, Nevada; but that the title in fee has never been acquired by the said Lynch or any of his grantors.

The portion of H street occupied by respondent was never opened to the public, but it is laid down as a street upon the official map of the city of Virginia, the survey of the city being made long after the occupancy and possession of the land by the grantors of respondent. There is a quartz mill and dwelling-house, owned by respondent, situate upon the land claimed by him.

For a period of sixteen years prior to the condemnation of the land there existed a public road across H street, which had been used by respondent, in common with the

Opinion of the Court—Hawley, C. J.

public, as a means of access to his quartz mill, and by reason of the excavations made by the appellant along said street, this highway had been destroyed and the access to respondent's quartz mill from that portion of Virginia city lying west of H street entirely cut off.

The dwelling-house is situate adjacent to the street, and the excavations destroyed the fence inclosing the house and rendered the access to said house from the street much more difficult. The compensation awarded by the commissioners was for the depreciation in value of the dwelling-house and the quartz mill, and depreciation of the land occupied by the respondent adjoining the cut made by appellant. No question is made as to the correctness of the award, so far as the amount thereof is concerned. From the views we entertain of this case it will be unnecessary to notice many of the important questions that were ably discussed in the oral argument by the respective counsel.

We consider it immaterial whether the title in fee to H street is in the United States or in the municipality of Virginia city in trust for the public. There is no pretense that either have ever granted the title to appellant, the only authority of appellant to make the excavations complained of, independent of the proceedings for condemnation, is a resolution passed by a two-thirds vote of the board of aldermen of Virginia city, which only purports to give and grant to it the right to use, run through and across all the streets which said track will run through and across. Assuming, therefore, without deciding the question, that this resolution was valid without the signature of the mayor, it only gives and grants the right of way to build a side track on H street. It did not, by its terms, authorize appellant to excavate or grade the street so as to destroy, obstruct, or interfere with its use as a street. Admitting, also, for the sake of the argument, that the statute of limitations does not run against the municipal corporation (a question upon which there is great diversity of opinion), and that respondent has no title by prescription to that portion of the land laid out upon the city map as H street, nevertheless we are of opinion that, as an owner

of the possessory title to the land abutting on said street, he had certain rights which are entitled to protection. He cannot, in this proceeding, be treated as a mere naked wrong-doer having no equitable rights in the premises. (*California Northern R. R. Co. v. Gould*, 21 Cal. 254.)

His right to use the street as a means of ingress and egress to and from his dwelling-house, and to use the road leading across said street to his quartz mill was acquired long prior to any right of appellant to use the street for any purpose. The rights acquired by respondent were valuable and could not be destroyed by appellant without compensation.

If the right of way could have been enjoyed without further damage than that which usually results from the mere ordinary use of a street by a railroad company laying its track thereon, independent of the questions of excavations or embankments that prevent the use of the street by the owners of lots abutting thereon, then there is a very respectable array of authorities which hold that the owner or occupants of such lots are not entitled to compensation. But none of the authorities cited by appellant's counsel go to the extent that the street, or a highway across the same, could be destroyed or obstructed to the extent shown in this case.

We think the respondent had the right, by virtue of his possessory title to the land, as against everybody except the government of the United States, of this state, or of the municipality of the city of Virginia, to prevent such excavations being made to his injury unless compensation was awarded for the damages resulting therefrom. The city of Virginia is not shown to have ever established any grade upon or over the land condemned. Appellant took the right of way along H street in the condition it found it. No rights were granted to it by the resolution to materially injure the use of the street to the damage of the lot-owners, without making compensation. Whether the legislature or the city authorities could legally grant the power to a private corporation to so change or alter the grade of a street as to prevent its use by the adjoining lot-owners, as a means

Opinion of the Court—Hawley, C. J.

of egress or ingress from and to their property, is a question we do not decide. The resolution shows the authority given, and none other is implied. Under all the facts and circumstances of this case, we are of opinion that respondent is entitled to the compensation awarded by the commissioners.

In *Tate v. The Ohio and Mississippi Railroad Company*, 7 Ind. 480, the defendant having been granted the right of way over William street, under an act of the legislature and by an ordinance passed by the city authorities of Lawrenceburg, claimed that it possessed every right essential to its enjoyment of the street. It made such an embankment along the center of the street as to prevent ingress and egress to the lots across it. The plaintiff did not claim that any part of his lots were appropriated by reason of the construction of the railroad. He only asked for damages for the obstruction of his easement in the street, and the consequent damages to his property. The city ordinance granting the right of way did not establish the grade upon which the track was to be laid, and the court held that the right must be restricted to "the grade of the street substantially as it then existed." In the discussion of the case the court, after approving the decision in *Haynes v. Thomas*, 7 Ind. 38, say: "A street which had been dedicated twenty-five years in front of Tate's lots, owned, occupied, and improved by him for fifteen years, is obstructed by the railroad embankment four and one half feet high. He alleges and proves special damages. In such a case the owner of the lots is entitled to recover for the obstruction of his easement in the street." In answer to a petition for rehearing the court said that the grant of the city "must be understood to mean that the railroad company might so use William street for its track and superstructure as not to obstruct it to the injury of the adjoining proprietors."

In *Lackland v. North Missouri Railroad Company*, 31 Mo. 180, the ordinance from the city authorities of St. Charles granting the right of way through Main street, was similar to the resolution in this case. The railroad company built a side track along the main track in the street fronting the

Opinion of the Court—Hawley, C. J.

plaintiff's lot, and a switch-track connecting the two others. These tracks rested on embankments which obstructed all passages of vehicles over any part of the street. The question was then presented to the court whether the grant of the right of way authorized the company to go to this extent. The court said: "In construing a grant of power to a private corporation the power must be given in plain language or by necessary implication. Whatever is doubtful is against the corporation."

After reviewing the cases of the *Commonwealth v. Erie and N. E. R. R.*, 27 Pa. St. 351, and *Tate v. The Ohio and Miss. R. R.*, *supra*, and approving the principles therein decided, the court held that a grant of a mere right of way over the public street did not authorize "the erection of depots, or car buildings, or any other structures, which materially obstruct the use of the street or highway as a public easement," and that it was immaterial "whether the plaintiff owned the ground to the middle of the street or not, as his right of action grew out of his ownership of the lot."

The principles announced in these cases fully support our views of the case under consideration. It is, however, proper to add that the conclusions we have reached are not antagonistic to the general proposition contended for by appellant, that a street may be occupied in common by a railroad and by the public in such a manner as not to abridge the freedom of its use for ordinary purposes, and that when so occupied and used, the abutting lot owners will not be entitled to any compensation.

The court, in *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 152, one of the strongest cases in favor of appellant upon this point, expressly state that the general rule which it decides is not in conflict with the decision in *Tate v. The Ohio R. R.*, *supra*.

The opinion in *Porter v. North Missouri Railroad Company*, 33 Mo. 128, does not disturb the rule announced in *Lackland v. North Missouri Railroad Company*, *supra*.

The order appealed from is affirmed.

Opinion of Beatty, J., concurring.

BEATTY, J., concurring:

I concur in the opinion that even assuming the land taken by the appellant to have been part of a street of Virginia city, the respondent was entitled to compensation for the injury sustained by him as owner of the land contiguous to the cut. I think, however, there is a still more satisfactory reason for affirming the decision of the district court. It appears from the evidence that the land embracing the so-called street was occupied, inclosed and built upon by the respondent or his grantors years before any map of Virginia city was filed in the land-office. When this proceeding was instituted, no street had ever been opened through the land so occupied by the respondent. It is very doubtful, from the evidence, if any survey of this part of the city had ever been made; all that appears with any degree of certainty is that various streets had been platted on a map, and the map some time in the year 1865, recorded in the county recorder's office, and copies filed, one in the local land-office at Carson, and another in the general land-office at Washington. The streets, as platted on the map, run through the inclosure and house of the respondent. The map was filed in the land-office by the direction of the board of aldermen of Virginia city, in assumed conformity to the town site act of congress of July 1, 1864. (R. S., sec. 2382 *et seq.*) I think, however, no authority can be found in that act or anywhere for what the board of aldermen attempted to do. Conceding that they had power to act in the premises at all, which is doubtful, I am entirely satisfied that they had no right to lay out imaginary streets running through valuable improvements, and by that simple process deprive citizens of their property without any compensation. The bare statement of such a proposition seems to me to demonstrate its absurdity.

It may be, and probably is true, that the respondent has not, and that his grantors have never had, any rights in the land inclosed and improved by them that congress might not disregard in favor of another donee; but they had rights which the subordinate officers of the land department, and

Opinion of Beatty, J., concurring.

more especially the board of aldermen of Virginia city, could not disregard. (See *Yosemite Valley case*, and cases cited, 15 Wal. 78.) They were occupying the land and had improved it, and the size of the tract was no impediment to their right of pre-emption. (R. S., sec. 2385.) In my opinion the respondent had a right of pre-emption in the whole tract occupied by him at the date when this proceeding was instituted. It appears that he or his grantor has a claim pending in the United States land-office for the whole tract, and his claim is superior, under any reasonable construction of the acts of congress, to the claim of Virginia city or the people of the state to the streets platted on the official map after his right of pre-emption had accrued. To say that congress may deprive him of his equitable right of pre-emption is wholly beside the purpose. There is no presumption that congress will do so, and certainly no one else can. In fact, it is not pretended that any one besides the board of aldermen of Virginia city has attempted to do so. All that appears to have been done in the land-office is to file certain applications for lots as they are laid down on the map, and the application of respondent's grantor, which, though it refers to the map as a means of description, that being necessary, distinctly contests the claim of the city by demanding a patent for the whole tract, including those parts of the so-called streets embraced within it. There has been no decision of any officer of the government in favor of the right of the city authorities to extend streets through improved lots, and in view of the provisions of the United States law, it is impossible to believe that such a decision will ever be made.

My conclusion is that the city of Virginia had no title to or control over the land taken by the appellant, and that the resolution of the board of aldermen was of no effect. The respondent having been in possession with a right of pre-emption, is entitled to be fully compensated for the land condemned and the resulting injury to the contiguous land.

I concur in the order of affirmance.

Opinion of Hawley, C. J., on rehearing.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, C. J.:

When this case was argued, appellant claimed a reversal, solely upon the ground that it was entitled to the money it had paid into court. No question was then made as to the validity of the acts of the commissioners, or as to the correctness of the amount of their award. In fact, it did not appear that any such objections were ever made or relied upon in the court below. These facts induced the writer of the opinion of the court to consider whether the record, viewed in the most favorable light for the appellant, would warrant a judgment in its favor. For this purpose it was then admitted, for the sake of the argument only, that even if the respondent was not the owner of the land marked out upon the official map of Virginia city as H street, still he was entitled to compensation for the injury to his land abutting the street.

A rehearing is now asked for, upon the ground that the commissioners did not, under the provisions of section 3445, 2 Comp. Laws, have "the power to find (and did not, in fact, find) any compensation except for property actually taken."

If this point had been urged upon the argument we should have deemed it necessary to decide whether upon the record it could have been considered, not having been made in the court below, and if so, whether it had any merit. And if we had considered the point well taken we would then have decided the case upon a ground that would have covered the objection now made, for we were then, and are now, satisfied that, upon the facts presented in the record, the respondent has such an interest in the land actually taken by the appellant as entitles him to compensation therefor. This being true, it necessarily follows that, under the rule laid down by this court in *The Virginia and Truckee Railroad Company v. Henry*, 8 Nev. 165, the respondent is clearly entitled, in this proceeding, to recover the compensation awarded by the commissioners.

The petition for a rehearing is denied.

Opinion of the Court—Leonard, J.

[No. 848½.]

JOHN WEARNE, RESPONDENT, v. W. J. HAYNES, APPELLANT.

COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST, OR FINE."—An order of a justice's court imposing costs against a garnishee that had refused to make a statement, is not a "tax, impost, assessment, or municipal fine," within the meaning of those words as used in section 4, article vi, of the state constitution.

APPEAL from the District Court, Sixth Judicial District, White Pine County.

W. J. Haynes, in *propria persona*, for Appellant.

No appearance by Respondent.

By the Court, LEONARD, J.:

On the twenty-ninth day of June, 1876, the plaintiff, John Wearne, commenced an action in the justice court of the ninth township, White Pine county, against Asa B. Eastwood, to recover one hundred and fifty-five dollars and forty-eight cents. A writ of attachment was issued and placed in the hands of James Henry, constable of said township. The plaintiff notified the constable that he had reason to believe, and did believe, that Bartholomew O'Connor, secretary of the San Jose Mining Company, and W. J. Haynes were indebted to, or had money or other property of the defendant Eastwood under their control, and requested the constable to act accordingly in the service of the writ. The constable, in his return, stated that he served the writ upon said O'Connor, who gave statement; that "he also served garnishment upon W. J. Haynes, of whom a statement was demanded, and said Haynes refused to give such statement." On the same day plaintiff, Wearne, made and filed an affidavit with the justice, setting out the above facts, together with the further facts that the defendant Eastwood was indebted to him in the sum of one hundred and fifty-five dollars and forty-eight cents, and that he had reason to believe, and did believe, that said W. J. Haynes was indebted to the said defendant, or that said Haynes had

Opinion of the Court—Leonard J.

money or other property belonging to said defendant, Eastwood, and asked the court to issue an order commanding Haynes to appear before the court, and answer concerning the same. An order was issued commanding Haynes to appear before the court on the thirtieth day of June, 1876, at ten o'clock A. M., and answer under oath as to whether or not he had any money or other property of said defendant, Asa B. Eastwood, under his control. The order was served on the defendant on the twenty-ninth of June, and he appeared at the time and place mentioned in the order. He testified that he was not indebted to defendant Eastwood, and that he had no money or other property under his control belonging to said Eastwood. Whereupon the court "ordered, decreed, and adjudged that John Wearne, plaintiff herein, do have and recover of and from W. J. Haynes, the garnishee, the sum of eleven dollars gold coin of the United States, with interest thereon at the rate of ten per cent. per annum until paid, the costs in this action."

It is admitted that the eleven dollars mentioned were the costs of the proceedings had under section 1193, Compiled Laws, for the purpose of obtaining information respecting the amount and description of the debt alleged to be due from Haynes to defendant Eastwood.

Haynes appealed from the judgment of the justice's court to the district court of the county, where the judgment was affirmed. Haynes now appeals to this court, and claims that this court has jurisdiction under section 4, article vi, of the constitution of this state, and section 914, Compiled Laws, which provide that "the supreme court shall have appellate jurisdiction in all cases in equity, and also in all cases at law, in which is involved the title or right of possession to, or the possession of, real estate or mining claims, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, exceeds three hundred dollars; also, in all other civil cases not included in the general subdivisions of law and equity, and also on questions of law alone, in all criminal

Opinion of the Court—Leonard, J.

cases in which the offense charged amounts to felony." Appellant claims that the requirement of the court that he should pay the costs of the proceedings stated, was a "tax, impost, or municipal fine." We do not think it was either, and are satisfied that this court has no jurisdiction of the question in dispute. If this court has jurisdiction on appeal, it is certain that the district court had exclusive original jurisdiction (Secs. 4 and 6, Art. vi, Const.), and it would follow that the last part of section 1193, Compiled Laws, is a dead letter in justices' courts. If the requirement of the justice that appellant should pay the costs of special proceedings taken under the statute is a "tax, impost, assessment, or municipal fine," it must be the last. But a fine is a sum of money paid, or required to be paid by way of penalty. It is a pecuniary punishment for doing something prohibited, or failing to do something commanded to be done by law. In all legal proceedings there must be costs, and one party or both must pay them. The general requirement is that they shall fall upon the party in the wrong or in default. In justices' courts, the plaintiff is allowed his costs, if he obtain judgment for any sum, because the defendant is in default in refusing to pay the amount found due, and an action is necessary. In the district court, in an action at law, the plaintiff is not allowed his costs if he obtain judgment for less than three hundred dollars, because, in such case, he should have brought his suit in the justices' court, where the costs would generally be less than in the district court. So the law provides that the sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to do so, he shall request the party owing the debts or having the credit, to give him a memorandum stating the amount and description of each; and if such a memorandum be refused, he shall return the fact of refusal with his writ. The statute further provides that "the party refusing the memorandum may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amount and description of such debt or credit." He is required to pay the costs, not as a punish-

Points decided.

ment, but because of his own fault in failing to give the memorandum. By his failure to comply with the statutory requirement, he compels the plaintiff to institute proceedings that would not have been necessary perhaps, had he done his duty; and being alone in fault, the law requires him to pay costs that he only has made. But they are in no just sense a fine, tax, impost, or assessment, and this court has no jurisdiction. The consent of parties cannot give jurisdiction to this or any other court. Having no jurisdiction over the matters in dispute in this proceeding, the merits will not be discussed, and the appeal is dismissed.

[No. 852.]

WILLIAM SOLEN, RESPONDENT, v. VIRGINIA AND TRUCKEE RAILROAD COMPANY, APPELLANT.

ACTION AGAINST RAILROAD COMPANY—DAMAGES FOR PERSONAL INJURIES—

NONSUIT.—S. was walking on his regular route from his work at the Ophir mine, along the track of the V. & T. R. R. Co., on a public street, much frequented by foot passengers in Virginia city; there was no sidewalk or passage-way provided along the street; there was a heavy snow storm with such high winds as to prevent his seeing more than ten feet ahead of him; there was snow on the rails which deadened the sound of the engine or train on the track; he was at a place where it was the usual custom of the railroad company when moving its trains or locomotives to give signals either by the whistle of the locomotive, or the ringing of the bell; he was looking ahead whenever he could and was listening for the sound of the whistle or bell, which he could have heard if such signals had been given; none was given; he was, without any warning, knocked down by a locomotive or tender backing along the track near a regular crossing: *Held*, that upon this statement of plaintiff's case, the court did not err in refusing to grant a nonsuit.

IDEM—DUTY OF PLAINTIFF—REASONABLE CARE—CONTRIBUTORY NEGLIGENCE.—A plaintiff is bound to use due and reasonable diligence, and to exercise ordinary care and prudence he must use his ordinary faculties in protecting himself from danger, and if he fails to use his eyes or ears, having the opportunity and ability so to do, then the court is authorized to grant a nonsuit upon the ground of contributory negligence.

IDEM—DEGREE OF DANGER.—The plaintiff's prudence is to be measured in proportion to the danger. The greater the risk the greater the degree of care required.

IDEM—DUTY OF DEFENDANT.—A railroad company, when moving its locomotives or trains upon the public streets of a city, is bound to use due care and give some signal of their approach.

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Points decided.

IDEM—PRESUMPTION THAT SIGNALS WILL BE GIVEN.—A person walking along a track on a public street, in a city, has a right to presume, and act on the belief, that the railroad company will not move its locomotives or cars along such track without giving the usual signals.

IDEM—NEGLIGENCE—WHEN A QUESTION OF LAW OR FACT.—When the facts showing a want of ordinary care and prudence on the part of the plaintiff, are clear and undisputed, the question of negligence is one of law, to be decided by the court; but when there is any doubt, or uncertainty; any question in regard to which reasonable men might honestly differ in opinion, then the question of negligence becomes a question of fact, and should be submitted to a jury.

IDEM—NEW TRIAL—VERDICT AGAINST EVIDENCE.—It is not the province of the appellate court to weigh the evidence in order to determine the preponderance thereof; that duty devolves upon the jury and the *nisi prius* court. If there is a substantial conflict in the evidence, this court will not disturb the verdict.

IDEM—DAMAGES WHEN NOT EXCESSIVE.—The plaintiff was thirty-four years of age, a miner by occupation; by the accident his right shoulder and some of his ribs were broken; one of his legs had to be amputated; he had severe pains through his breast and sides, was confined to his bed five or six weeks; his right shoulder and arm were disabled. He has no means of support except by his personal labor: *Held*, that the verdict of fifteen thousand dollars is not so excessive as to indicate passion or prejudice upon the part of the jury.

PUBLIC STREET—DENIALS IN ANSWER—WHEN INSUFFICIENT.—The track of defendant runs along E street in Virginia city. The complaint alleges in positive terms that this was "a public street of said city; the answer denies that the plaintiff was rightfully or lawfully walking on its track at the time of the injury, or that the public were accustomed to walk thereon, or that they had any right so to do:" *Held*, that these averments in the answer did not constitute a denial of the allegation in the complaint that defendant's track was on a public street.

INSTRUCTIONS—WHEN VERDICT WILL NOT BE SET ASIDE.—A verdict ought never to be set aside simply because some expressions of the court, in its charge to the jury, might, in some particulars, when considered apart by themselves, be susceptible of verbal criticism which, when taken and considered with other portions of the charge, could not possibly have misled a jury of ordinary intelligence.

INSTRUCTIONS—REASONABLE CARE—DANGER—KNOWN DISPOSITION OF MEN.—The court instructed the jury as follows: "In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger:" *Held*, not prejudicial to the defendant.

IDEM—RULE OF DAMAGES.—The court instructed the jury as follows: "In cases of this character the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury:" *Held*, not erroneous.

Statement of Facts.

APPEAL from the District Court of the First Judicial District, Storey County.

The complaint, with reference to the question whether E street is a public street—alleges: “That on or about the twenty-fifth day of February, 1876, between the hours of six and seven o'clock in the morning of said day, the said plaintiff was returning to his home from his work as a miner in the North Consolidated Virginia mine, in the Virginia Mining District, Storey county, and state of Nevada, and for the purpose of returning as aforesaid, was walking along “E” street, a public street in the city of Virginia, state of Nevada, upon which is constructed the said railroad track of the said defendant, as he, the said plaintiff, might rightfully and lawfully do, and as the public are accustomed to do, and rightfully do.”

The answer denies “that plaintiff was rightfully or lawfully walking on its road at the time of the injury by him alleged, or that the public are, or ever were, accustomed so to do, or that they have any right so to do. Defendant avers that any one who walks on its road at the point by plaintiff designated, does so against its consent and at his or her own great peril.”

The instructions of the court, referred to in the opinion, read as follows: “The plaintiff has brought this action to recover from the defendant the sum of forty thousand dollars, for injuries resulting from an accident which it is claimed was caused by carelessness and negligence on the part of the employees of defendant, a railroad company. It is admitted that, on the twenty-fifth of February last, an engine belonging to the defendant ran on the plaintiff and produced serious injuries. The first question for you to determine, and which is disputed, is, did this accident result from the carelessness of the employees of the railroad company? If so, the defendant is responsible. The next question which is presented by the testimony is, did the plaintiff in the action contribute by his carelessness to the injury or accident? If so, he cannot recover. The question of negligence, by which is meant that want of care and dili-

Statement of Facts.

gence which it is the duty of a party to observe, is always one which must be considered in regard to the circumstances. There is no absolute rule of negligence or diligence. The diligence required of a party is that care and attention to the matter in hand which an ordinarily prudent, careful man would exercise in regard to his own transactions.

Whether the parties exercised or failed to exercise diligence, is a question for the jury to determine; and under the circumstances of this case, both the plaintiff and the defendant were bound to use reasonable diligence, the plaintiff to avoid receiving injuries and the defendant to avoid committing injury. Reasonable care is that care which men of ordinary prudence are accustomed to employ, and which, placed in like circumstances with the plaintiff, they would have employed. The evidence of proof of negligence on the part of defendant is upon the plaintiff, and the jury must be satisfied from the evidence that defendant and its employees were negligent, before they can find a verdict for the plaintiff. In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger.

The law imposes the duty on railroad companies to exercise reasonable care in the running of engines and to adopt proper precaution against accidents likely to happen by reason of the railroad; and the faulty neglect of a railroad company in these respects, when satisfactorily shown, subjects it to liabilities for injuries caused thereby. If the jury believe that at the place where the accident occurred to plaintiff the defendant's railroad track is laid in a public and much frequented street, at the city of Virginia, then the defendant was bound to use reasonable care and diligence, by ringing the bell, sounding the whistle, or otherwise giving sufficient signals of the approach of the engine to avoid committing injury; and if the jury believe the defendant failed to give such signals, then the defendant is liable to the plaintiff for the damage sustained by him, un-

Statement of Facts.

less the jury also believe that the plaintiff failed to use reasonable care and caution to avoid receiving injury, and by such want of care contributed to the accident.

The plaintiff was required to exercise that degree of prudence, care and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, having regard to its being a railroad track on which he was passing at the time of the accident. The plaintiff in this case cannot recover, unless you shall be satisfied from the evidence that he was free from negligence or blame in the matter which contributed to the accident.

The plaintiff was required to exercise proper care as well as the defendant and its servants, and if by the exercise of such care the plaintiff could have avoided the danger, he was guilty of negligence, and he, in such case, is not entitled to recover. If the plaintiff while walking on the track was guilty of any negligence contributing to, or towards his injury, he cannot recover in this action; the negligence, if any, of the employees of the railroad company will not excuse the negligence of the plaintiff, and if his want of care contributed to the accident, he cannot recover notwithstanding the employees of the railroad company may have been negligent. If the jury believe from the evidence that the plaintiff might, by the exercise of ordinary care, have escaped the accident whereby he was injured, then he was guilty of contributory negligence, and you will find a verdict for defendant. The railroad company being in the rightful possession of the street, was lawfully entitled to run its railway engines, tenders and cars, on and along its track, and plaintiff had no right to walk on the track when being used by the defendant, and his presence there was negligence on his part unless you believe he was using every diligence and care to avoid injury. In cases of this character the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury, and if the jury find for the plaintiff, then in fixing the amount of damages, the jury may take into consideration not only the

Argument for Appellant.

amount of damages which the plaintiff suffered prior to the commencement of the action, but also all the damage preceding, continuously from the injury complained of which he has suffered up to the verdict, and which it is reasonably certain that he will suffer in the future."

The other facts are sufficiently stated in the opinion.

Whitman & Wood, for appellant.

I. Respondent was guilty of contributory negligence as shown by his evidence in chief, therefore he cannot recover. (*Fleming v. W. P. R. R. Co.* 49 Cal. 253; *Moore v. Cent. R. P. Co.*, 4 Zab. 268; *Terre Haute R. R. Co. v. Graham*, 46 Ind. 239; *Toledo R. R. Co. v. Shawckman*, 50 Id. 42; *Finlayson v. R. R. Co.*, 1 Dill. 579; *Evansville R. R. v. Lowdermilk*, 15 Ind. 120; *Hearne v. S. P. R. R. Co.*, 50 Cal. 482; *Delaney v. M. & S. R. W. Co.*, 33 Wis. 67; *Artz v. C. R. I. & P. R. Co.*, 38 Iowa, 293; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Elwood v. N. Y. Cent. & H. R. R. Co.*, 4 Hun. 808; *Langhoff v. M. P. R. Co.*, 23 Wis. 43; *Dewille v. S. P. R. Co.*, 50 Cal. 383; *Roth v. M. & S. R. Co.*, 21 Wis. 256; *Lewis v. B. & O. R. Co.*, 38 Md. 588; *P. & C. R. Co. v. Andrews*, 39 Md. 329; *Haight v. N. Y. C. R. Co.*, 7 Lan. 11; *Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440; *Wilcox v. R. W. & O. R. Co.*, 39 N. Y. 359; *M. & E. R. Co. v. Haslan*, 33 N. J. (Law), 147; *Johnson v. Tillson*, 36 Iowa, 89; *North Penn. Co. v. Heileman*, 49 Penn. St. 60; *Patterson v. B. & M. R. Co.*, 38 Iowa, 279; *Runyon v. N. J. C. R. Co.*, 1 Dutcher. N. J. 556; *Brown v. E. R. Co.*, 58 Me. 384; *Stubley v. N. W. R. W. Co.*, 1 Exch. (Law Rep.) 13; *Skelton v. L. & N. W. R. Co.*, 2 C. P. (L. R.) 635; *Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 495; *B. R. Co. v. Hunter*, 33 Ind. 335; *Wilds v. H. R. R. Co.*, 29 N. Y. 315, 327; *Steves v. O. R. Co.*, 18 N. Y. 422; *Mackay v. N. Y. Cent. R. Co.*, 27 Barb. 528; *Butterfield v. West. R. Co.*, 10 Allen, 532; *Telfer v. North. R. Co.*, 1 Vroom. 187; *Brooke v. Buffalo R. Co.*, 27 Barb. 532, note; *Dascomb v. Same*, Id. 221; *Beiseigel v. N. Y. Cent. R. Co.*, 40 N. Y. 9; *Allyn v. Boston R. Co.*, 105 Mass. 77; *Hewett v. N. Y. Cent. R. Co.*, 3 Lan. 85; *Simpson v.*

Argument for Appellant.

Keokuk, 34 Iowa, 568; *Hinckley v. Cape Cod R.*, 120 Mass. 257; *Shearman & Redfield*, on Negligence, 3d ed. 577, secs. 11, 12, 33, 34; *Baltimore & Potomac R. R. Co. v. Jones*, Central Law Journal, vol. 6, p. 45; *Cleveland C. & R. Co. v. Elliott*, 28 Ohio St. 340; *Chicago, Rock Island R. R. Co. v. Houston*, Central Law Journal, vol. 6, 132; *Penn. R. Co. v. Beale*, 73 Pa. St. 509; *Phila. R. v. Hummel*, 44 Pa. St. 375; *Fox v. Town of Glastenbury*, 29 Conn. 209; *Herring v. Wil. & R. R.*, 10 Ired. 402; *Grippen v. N. Y. Cent. R.*, 40 N. Y. 47; *Pierce Am. R. R. Law*, 272-278; *Evansville R. v. Hiatt*, 17 Ind. 102; *Catawissa R. R. Co. v. Armstrong*, 49 Pa. St. 186; *Benton v. Cent. R. of Iowa*, 42 Iowa, 192; *Jeffersonville etc. R. v. Goldsmith*, 47 Ind. 43.)

II. The question whether a party has been negligent in a particular case, is one of mingled law and fact; when the facts are clearly settled and the course which common prudence dictates can be clearly discerned, the court should decide the case as matter of law. The court refused so to decide, therefore erred in refusing a nonsuit. (*Shearman & Redfield on Negligence*, 3d ed. sec. 11; *Stubley v. Northwestern R. R. Co.*, Exch. 13 (Law Rep.); *Pittsburg etc. R. R. Co. v. McClurg*, 56 Penn. St. 294; *Brown v. European R. Co.*, 58 Mo. 384; *Delaney v. Milwaukee etc. R. R. Co.*, 33 Wis. 67; *Toomey v. The London etc. R. R. Co.*, 3 C. B. N. S. 146; *Mellors v. Shaw*, 1 Best. & S. 437; *Ryder v. Wombwell*, 4 Exch. 39 (Law Rep.); *Bridges v. The N. London R. Co.*, 6 Q. B. 377 (Law Rep.); *Siner v. Great Western R. Co.*, 4 Exch. 117 (Law Rep.); *Fleming v. W. P. R. R. Co.*, 49 Cal. 253; *Butterfield v. W. R. Co.*, 10 Allen, 532.)

III. The court erred in not granting a new trial, as the vast preponderance of the evidence was in defendant's favor: *Seibert v. Erie R. R. Co.*, 49 Barb. 583; *Swearingen v. Birch*, 4 Yeates, Pa. 322; *Lockwood v. Atlantic Ins. Co.*, 47 Mo. 50; *Dewey v. Chicago R. R. Co.*, 31 Iowa, 373; *State v. Yellow Jacket S. M. Co.*, 5 Nev. 422; *Sherman v. Mitchell*, 46 Cal. 576; *Gilligan v. N. Y. etc. R. R. Co.*, 1 E. D. Smith, 453; *Treadway v. Wilder*, 9 Nev. 67.) The court should consider this case as an exception to the general rule against interference with the judgment of the lower court on the evidence, and

Argument for Respondent.

hold that there is no substantial, nor any evidence, to sustain the verdict of the jury, and the action of the district judge. (*Carlin v. Chicago etc. R. R. Co.*, 37 Iowa, 316; *Dickey v. Davis*, 39 Cal. 565; *Howard Ex. Co. v. Wild*, 64 Pa. St. 201; *Toledo etc. R. R. Co. v. Shanckman*, 50 Ind. 49.) We are willing to accept the rule as held in this state, and most strongly stated in *State of Nevada v. Yellow Jacket S. M. Co.*, 5 Nev. 420, though we prefer that of *State v. C. P. R. R. Co.*, 10 Nev. 48, and in *Longabaugh V. & P. R. R. Co.*, 9 Nev. 302.

IV. The damages in this case were estimated upon no known rule, and were excessive, therefore the verdict should be set aside. (*Chicago R. R. Co. v. Jackson*, 55 Ill. 492; *L. & N. R. R. v. Fox*, 11 Bush, 495; *Goodno v. Oskosk*, 28 Wis. 300; *Paulmier v. Erie R. R. Co.*, 34 N. J. (Law Rep.) 151; *Ellsworth v. Cent. R. R. Co.*, 34 N. J. (Law Rep.) 93; *Rowley v. London & U. U. R. Co.*, 8 Exch. 230 (Law Rep.); *Quigley v. C. P. R. R. Co.*, 11 Nev. 351; *Malone v. Hawley*, 46 Cal. 409.

V. The instructions to the jury were erroneous, and calculated to mislead the jury.

C. H. Bellnap and Kirkpatrick & Stephens, for Respondent.

I. It is admitted that E street is a public street of the city of Virginia. Solen, therefore, had a right to walk upon the railroad track. The defendant, in operating its railroad at the point where Solen was injured, was bound to use ordinary care. (*Sherman & Redfield on Negligence*, sec. 491; *Fettritch v. Dickinson*, 22 How. Pr. 249; *Shea v. Potrero & B. V. R. R. Co.*, 44 Cal. 414; *Flash v. Third Ave. R. R. Co.*, 1 Daley, 148; *Wilbrand v. Eighth Ave. R. R. Co.*, 3 Bos. 314; *Cook v. N. Y. Floating Dry Dock Co.*, 1 Hilt. 436; *Kan. Pacific R. R. Co. v. Pointer*, 9 Kan. 620; *Cent. R. R. Co. v. Dixon*, 42 Geo. 327; *Grippen v. N. Y. Cent.*, 40 N. Y. 42; *Bradley v. B. & M. R. R. Co.*, 2 Cush. 539; *Robinson v. W. P. R. R. Co.*, 48 Cal. 409.

II. The question as to what is ordinary care is a question of fact, depending upon the circumstances of each particular case. No general rule can be laid down upon the sub-

VOL. XIII.—8.

Argument for Respondent.

ject, but each case must turn upon its own peculiar facts. (Shearman & Redfield on Negligence, sec. 488; 1 Dillon, C. C. Rep. 581.)

III. A nonsuit should not have been granted by the court, if there was any evidence tending to prove that plaintiff was not himself guilty of contributory negligence. (*Richmond et al. v. Sacramento R. R. Co.*, 18 Cal. 351; *Wheelock v. B. & A. R. R. Co.*, 105 Mass. 206; *United States v. Taylor*, 5 McLean, 242; *Baxter v. Second Av. R.R. Co.*, 30 How. Pr. 219; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Sheirhold v. N. B. & M. B. R. R. Co.*, 40 Cal. 453; *Hackford v. N. Y. Cent. & Hud. R. R. Co.*, 43 How. Pr. 222; 53 N. Y. 645; *Pa. R. R. Co. v. Ogier*, 35 Pa. St. 60; *Wilcox v. Rome, Watertown & Og. R. R. Co.*, 39 N. Y. 361.)

IV. The rule of law which forbids a plaintiff to recover, whose own conduct has contributed to the injury sustained, is founded upon public policy. The law requires every man to take a reasonable care of himself. The doctrine of contributory negligence applies only in those cases where the act of the plaintiff has, to some extent, directly contributed to the injury sustained. (*B. & O. R. R. Co. v. Trainor*, 33 Md. 542; *Trow v. Vermont Cent. R. R. Co.*, 24 Vt. 494; *Wakefield v. C. & P. R. R. Co.*, 37 Id. 330; Wharton on Negligence, sec. 388; *Chaffee v. B. & L. R. R. Corp.*, 104 Mass. 115; 55 Mo. 23; 19 Conn. 566; 26 Id. 591; 60 Mo. 323, 475; 43 Id. 380; 59 Id. 223; 45 Id. 255.

V. Under the statute to authorize the granting of a new trial, damages must not only be excessive, but must appear to have been given under the influence of passion or prejudice. There is no fixed rule to govern the amount of damages which a jury may award in a case of this nature. The whole subject is left to the good sense of the jury, and with its verdict neither the trial judge nor the appellate court will interfere, except in a clear case. (*P. R. R. Co. v. Allen*, 53 Pa. St. 276; Sedgwick on Dam. 764.) If the proper amount of damages to which Solen was entitled is to be determined by comparison, then we insist the verdict must stand. (*Caldwell v. N. J. Steamboat Co.*, 56 Barb. 426; *Boyce v. Cal. Stage Co.*, 25 Cal. 460; *Worster v. Props. of*

Argument for Appellant on rehearing.

Canal Bridge, 16 Pick. 547; *Shaw v. B. & W. R. R. Co.*, 8 Gray, 45; *Choppin v. N. O. & C. R. R. Co.*, 17 La. An. 19; *Robinson v. W. P. R. R. Co.*, 48 Cal. 409.) In a few English cases an attempt has been made to establish such a measure of damages as will give the injured party an annuity commensurate with the income derived by his own efforts before the injury, and which the injury has prevented him from further obtaining. No such rule has obtained in this country; but if such a rule were to be established here, then we maintain that the amount given by the verdict is not disproportionate to the income Solen derived from his work as a miner.

S. W. Sanderson, for Appellant on rehearing.

I. The motion for a nonsuit ought to have been granted. The charge of negligence, on the part of defendant, is grounded solely upon its omission to ring the bell or sound the whistle. The defendant was under no statutory or common law obligation to do either, because:

1. The statute which requires a railroad company to ring a bell or sound a whistle on approaching a highway-crossing is for the benefit of persons traveling on such highway, and who may be approaching the crossing and about to cross the railroad; and hence a person who is injured by the engine while walking along the track of the railroad, cannot recover upon the ground that his injury was caused by the failure of the company to comply with the statute. (*O'Donnell v. P. & W. R. R. Co.*, 6 R. I. 211; *Holmes v. The Central &c. R. R. Co.*, 37 Ga. 596.) The plaintiff, in this case, was not approaching or upon a crossing. He was walking along and upon the railroad.

2. The common law did not require the defendant to ring the bell or sound the whistle, because E street, at the place in question, and at the time in question, whatever it may have been formally in fact, or according to the map or plan of Virginia city, was not there and then a public street or highway, but was in fact a part of the yard and depot grounds of the defendant. The fact that foot-passengers were allowed to pass and repass along the track without ob-

Argument for Appellant on rehearing.

jection from defendants, did not convert the defendant's yard into a public way, or entitle them to the benefits of bell or whistle. (*Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. R. 112; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 372-3; *Phil. & Read R. R. Co. v. Hummell*, 44 Pa. St. 375; *Gillis v. Penn. R. R. Co.*, 59 Id. 129.) This is not a case where the parties were in their places of equal right. The plaintiff was not in the exercise of a legal right; the defendant was. At best, the plaintiff was merely enjoying a privilege or favor granted by defendant without compensation or benefit. Where such are the conditions, the plaintiff must show extraordinary care before he can complain of the defendants. The plaintiff was negligent, and his negligence contributed proximately to the injuries which he sustained. (Counsel here cites the authorities reviewed in the opinion of the court on rehearing.) The plaintiff made a case of negligence in law. The court ought to have so declared upon the rule stated by Wharton in his work on Negligence, sec. 420. (*Lewis v. Balt. & Ohio R. R. Co.*, 38 Md. 588; 17 Am. R. 521; *Fleming v. Western etc. R. R. Co.*, 49 Cal. 253; *Keller v. N. Y. Cent. R. R. Co.*, 24 How. Pr. 172; *Pittsburg etc. R. Co. v. McClurg*, 56 Penn. St. 300; *Toledo & Wab. R. R. Co. v. Goddard*, 25 Ind. 194; *Harlan v. St. L. & C. R. R. Co.*, 65 Mo. 22; *Chicago R. I. & C. R. R. v. Houston*, Cent. L. J., vol. 6, p. 132.)

II. The court below erred in not granting a new trial. The instructions, as a whole, might not mislead a lawyer, but were liable to confuse and mislead a jurymen. The court erred in instructing the jury to take into consideration the known and ordinary disposition of men to guard themselves against danger. (*Gay v. Winter*, 34 Cal. 153.) The court erred in instructing the jury as to the measure of damages. (*Sherman & Redfield on Negligence*, sec. 606; *Heil v. Glanding*, 42 Pa. St. 493.) The plaintiff was entitled to just compensation, and nothing more. This is not a case for exemplary damages, there being no evidence of willful or intentional wrong. (*S. & R. on Negligence*, sec. 600; *Moody v. McDonald*, 4 Cal. 297; *Hagan v. P. & W. R. Co.*, 3 R. I. 88; *Sedgwick on Damages*, 5 ed. 532.)

By the Court, HAWLEY, C. J.:

The plaintiff, William Solen, while walking along the track of the Virginia and Truckee railroad company was knocked down and run over by the tender of defendant's engine. His collar bone and one or two of his ribs were broken, and one of his feet so badly crushed as to require immediate amputation. He brought this suit to recover forty thousand dollars damages for the injuries thus received. The jury awarded him fifteen thousand dollars. The defendant moved for a new trial, which was refused. This appeal is taken from the order of the district court refusing a new trial and from the judgment.

1. When plaintiff rested his case the defendant moved for a nonsuit upon the following grounds: First. There is no sufficient evidence to entitle the plaintiff to go to the jury; Second. There is no showing of any such negligence on the part of defendant as would entitle plaintiff to recover; Third. The evidence fully shows that the negligence of the plaintiff contributed to the accident.

Appellant claims that the court erred in refusing to grant this motion.

It is conceded by counsel that a nonsuit should not have been granted unless upon the plaintiff's own showing it clearly appears that he was guilty of contributory negligence.

The plaintiff had resided in Virginia city for nearly two years, and was engaged as a laborer in the North Consolidated Virginia mine. On the morning of the twenty-fifth of February, 1876, he came off his shift at seven o'clock, and started for his boarding house on his regular route from the Ophir works, along the railroad track of defendant on E street. There was a very heavy snow-storm blowing in his face. While traveling along the main track he was knocked down by defendant's locomotive, or tender, backing north at a point near the crossing of Sutton avenue.

The plaintiff testifies as follows: "I took all possible care that could be possibly taken; was listening as much as possible, and watching ahead at times when I could; I did

Opinion of the Court—Hawley, C. J.

not see the engine before it struck me; heard no signal; was not warned by anybody; heard no steam whistle and there was no bell ringing; the wind was blowing from the south, parallel with E street and the track; the storm was heavy, and I could not tell * * how far I could see ahead of me through the storm; but at times, probably say ten feet, and at other times I couldn't see hardly any distance at all; it came in gusts, kind of blinded me so that I couldn't see any distance whatever; I do not know how many tracks there were on E street, between Union street and the Ophir trestle, but my impression is there were four; the street was mostly occupied by tracks at this point; I was walking on the main track, the second from the freight depot; I don't know what distance there was between the tracks; the ground between them was partly broken and rough ground in places, and all covered over level with snow; between the rails it was level and pretty smooth; there were large piles of heavy lumber outside the track, and no sidewalks or passage-way provided along the street; E street is a much frequented street, and at that time foot-passengers were in the habit of traveling along it as their business required them; * * the men employed in the Consolidated Virginia, California and Ophir mines, were in the habit of passing along the street and railroad track going to their work and homes; there was probably from four to six inches of snow on the track at the time of the accident, which deadened all sound of engine or train on the track; I heard no sound of the engine, nor of the bell or whistle; if either had been sounding I could have heard it, for the reason that the wind was blowing directly to my ear."

Plaintiff had passed over the track for a year, and knew that it was used for running cars back and forward and for moving track engines, tenders, freight and passenger cars. Upon cross-examination, in reply to the question, "Could you have helped seeing it (the engine) if you had been looking that way?" he answered: "I cannot say," and added: "I don't know that I was taking all possible care in walking on the track at all; but suppose one has got to walk there

when he has got no other place to walk. There were four tracks and a space between the tracks, but I could not say with what safety a man could walk there. I suppose in a clear day one might walk there if he could see exactly where it was marked. I was walking between the rails because it was my habit. I supposed I had a right to do so, and it was better traveling." Further on he says: "I thought I was rather in a dangerous place, but I expected as the storm was blowing as hard as it was, being a stormy morning, and they being in the habit of giving signals if there was an approaching train; I took all possible care looking ahead. * * At times I could see ten feet, and at other times I could not see at all. * * I say there was no bell ringing for the simple reason I didn't hear any. The wind was blowing my way from the south, and if a bell had been ringing I should have heard it."

Charles McDermott testified in plaintiff's behalf as follows: "I was brakeman on the locomotive J. W. Bowker, and was on it at the time of the accident. Immediately preceding the accident the engine was standing still and commenced to back twenty-five or thirty paces from where we run over Solen. With me on the engine were Thomas Martin, engineer; James Boyd, brakeman, and John Monohan, fireman. * * When the engine started Thomas Martin was in his place on the right-hand seat of the cab. Monohan was in the tender piling wood. James Boyd was sitting in the cab on the opposite side of the engine. I was standing partly with one foot on the tender and one foot on the engine, with my hands up against the cab. From the time the engine started until it stopped, after running over Solen, there was no signal given that I knew of. The bell was not ringing. I did not hear it ring. None of the parties in the engine rung the bell. * * I was six or seven feet from the bell-rope. There was no look-out in the direction the engine was moving that I know of. I didn't see Solen until we struck him and run over him. There was no passage-way around the west of the freight depot except by going around the platform, which is two or three feet high, and there is no chance for one coming from

Opinion of the Court—Hawley, C. J.

the direction of the Ophir to walk on the platform except by climbing on it. He would have to climb about three feet. I suppose if the bell had been ringing at the time of the accident that Solen would have heard it when he got within three or four feet. We were running very slow—not to exceed four miles an hour. E street was at that time, and before that time, a much frequented street by passengers, miners going to and from work at all hours of the day and night; great numbers passing along every day walking upon the track—walking every place, in fact.”

This witness was subjected to a rigid cross-examination. He adhered to his statement that he did not ring the bell, and persistently denied that the engineer ordered him to ring it, and also denied that he said to Solen at the time of the accident, “D—n it, man, I was ringing the bell myself.” In the light of this testimony we do not think the court erred in refusing to grant a nonsuit.

The plaintiff was bound to use ordinary care and prudence and to use his ordinary faculties in protecting himself from danger, and if the evidence shows beyond controversy that he failed to use his eyes or ears, having the opportunity and ability to do so, then the court, under the rule laid down by many of the authorities cited by appellant’s counsel, would have been justified in granting a nonsuit upon the ground that the plaintiff was guilty of contributory negligence. But none of the decisions go to the extent that if the plaintiff did not use both his eyes and ears he would necessarily be guilty of contributory negligence.

A traveler walking along a railroad track upon a public street is bound to use reasonable care and prudence. If he can see, he is bound to look; if he can hear, he is bound to listen; ordinarily, he is required to both look and listen. But if, without his fault, he is for the time being deprived of making full use of his eyes, and he is at a place where he can hear the ringing of a bell or the sounding of a whistle, and it is at a place where it is the usual custom, as well as the requirement of the law, for the railroad company to ring its bell or blow its whistle, and he does listen, then he would not be guilty of negligence, from the simple fact that

without any fault on his part, he was for the time being deprived of the sense of sight to such an extent that he could not see the approach of a locomotive.

In *Flemming v. The Western Pacific Railroad Company*, the plaintiff, in driving a four-horse team over the crossing of the railroad, was, owing to the atmosphere being completely filled with dust, prevented from seeing but a few feet from him, and owing to the noise of his wagon, could not hear the approaching train. He did not stop to listen, and while attempting to cross the track was injured. He was held guilty of contributory negligence, because "as the plaintiff could not use his eyes with effect, it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion." (49 Cal. 257.)

The same principle was declared in *Benton v. The Central Railroad of Iowa*, where the court held the plaintiff guilty of contributory negligence, because he "neither looked nor listened, but thoughtlessly drove into the danger." The court said: "It may have been that the immediate noise of his wagon prevented him from hearing. If this was so, he should have stopped his team and listened." If the plaintiff had listened he would "have heard the train in time to have avoided the injury." (42 Iowa, 195.)

In *Shearman and Redfield on Negligence*, the general rule, with its exceptions is thus stated: "It is universally deemed culpable negligence for any one to cross the track of a railroad operated by steam power in full view or hearing of an approaching train, or without taking any precautions, if any are reasonably within his power, to ascertain whether a train is approaching; and as a general but not invariable rule, it is such negligence to cross without looking in every direction that the rails run, to make sure that the road is clear. But in all the cases where this rule has been enforced, the circumstances made it reasonable, as the most natural and reasonable way of ascertaining that there was no danger. Where, however, the injured party had other satisfactory evidence that it was safe for him to proceed, it has been held that he was not absolutely bound to

Opinion of the Court—Hawley, C. J.

look up or down the track. If the track is so obstructed that the traveler cannot see along it, it may be sufficient for him to listen for the approach of a train. If he both looks and listens, no more can be expected of him." (Sec. 488.)

It is shown by plaintiff's testimony that it was the usual custom of the defendant, when moving its locomotives and trains along the track where plaintiff was injured, to ring its bell or blow its whistle.

This testimony is, in fact, materially strengthened by the evidence offered upon the part of defendant. The engineer of defendant's locomotive, J. W. Bowker, upon his cross-examination, testified as follows: "It is generally the duty of any one who is near to ring the bell—fireman, engineer or brakeman. There is no person designated to ring the bell. It is everybody's duty who is near the bell. It is the duty of the engineer to see that the bell is rung, and it is the duty of the fireman to ring it. It is the duty of all employees on an engine to take all necessary precautions. If they are near the rope they are to ring the bell."

It is admitted that the place where the injury occurred was within eighty rods of a crossing, and, under the law of this state, the railroad company was required to ring its bell. (2 Compiled Laws, 3466.) But independent of the custom and the statute we are clearly of the opinion that it is the duty of a railroad company at all times, when moving its locomotives or trains through the public streets of a city, to give some signal of their approach. To move its locomotives or cars through the streets at night, or on dark, stormy and windy days, without giving any signal, would be gross negligence.

Woodruff, J., in *Grippen v. New York Central Railroad Co.*, speaking of the legal duty, which rests upon railroad companies to run their engines and cars carefully, prudently, with a caution proportioned to their power of injury and governed by a due regard for the time and place, and other circumstances affecting the liability of third parties to receive injuries, says: "This high measure of duty on the part of the railroad company, the statute, prescribing notices by sign-boards at road or street crossings, the ring-

ing of the bell or the blowing of the whistle, has not relaxed in any degree. As a rule of duty it stands as stringent and inflexible, founded in common law and the plainest right, as if there were no such statute. Compliance with the statute, is, of course, one of the circumstances, under which they run their trains; and, incidentally, such compliance may make it consistent with due care and caution, to do what, without using such signals, would, even if there were no such statutes, be negligence. But the rule stands and the statute stands with it; both must be satisfied. And hence, it is properly said, the statute does not constitute the sole rule of duty. The common law still requires the exercise of care and prudence in the running of their ponderous engines and heavy trains through an inhabited country; and that care and prudence increases in degree, as they enter towns, villages and cities and cross their thoroughfares." (40 N. Y. 42.)

Under all the circumstances of this case we are unwilling to say, as a question of law, that the plaintiff, as a reasonable, careful and prudent man, had no right to assume or to act upon the belief that the defendant would not move its locomotive or cars without giving the usual signals.

It has been frequently decided that a railroad company, in the conduct and management of its engines and trains, has the right to act upon the assumption that a traveler in walking upon or driving across its track will use due care and prudence to avoid impending danger. In *Philadelphia and Reading Railroad Co. v. Hummell*, in defining the care and duty of a railroad company, the court say: "Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws. * * Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care under the circumstances of a case is generally to be determined by the jury. Yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligent which is

less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precautions against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence." (44 Pa. St. 379.)

In *Finlayson v. Railroad Company*, Justice Miller instructed the jury that the agents of the railroad company had the right to suppose that a man seen walking upon the railroad track in front of a moving train of cars was a man of sound mind, and that he would take reasonable care to protect himself in case of danger. (1 Dillon C. C. 582.)

The same general principles have been often applied in favor of persons who have been injured in attempting to cross over or walk upon a railroad track. In *Newson v. The New York Central Railroad Company*, the court declare that "the law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." (29 N. Y. 390.)

Porter, J., in delivering the opinion of the court in *Ernst v. Hudson River Railroad Company*, 35 N. Y. 9, discusses this question at great length. After referring to the statute which requires a railroad company to ring its bell for a distance of eighty rods before passing a crossing, and declaring that a railroad is responsible in damages for any accident that might occur by reason of its neglect, unless the plaintiff had been guilty of a breach of duty which contributed to the injury, said: "The plaintiff is not guilty of such breach of duty when he assumes, in the absence of any indication to the contrary, that the company obeys the law, and that no engine is advancing to the crossing within a distance of eighty rods without public signals of its approach. If he is deceived by the unlawful omission of the signals, the wrong is not his, but theirs."

Justice Miller, in *Wilcox v. The Rome, Watertown and Ogdensburg Railroad Company*, 39 N. Y. 358, questioned the correctness of the views expressed in *Ernst v. Hudson River Railroad Company*, *supra*, and it may with safety be said,

without referring to the authorities, that there is a singular lack of uniformity in the subsequent decisions of the court of appeals of New York upon this question.

In *Robinson v. The Western Pacific Railroad Company*, the court said: "Nor should the fact that the plaintiff was on the track—disconnected from the other circumstances—be considered as proving negligence. * * * The plaintiff here was exercising an undoubted right, and she was authorized to assume that all other persons using the street would act with due care. It cannot be imputed as negligence that she did not anticipate culpable negligence on the part of the defendant. * * * She could properly act on the presumption that the employees of the defendant would use the degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances, due regard being had for the rights of others. (48 Cal. 421.)

In *Kennayde v. Pacific Railroad Company*, the court decide that a citizen upon the public highway, in approaching a railway track, when he can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. "He has a right to assume that in handling their cars the railroad companies will act with appropriate care," and "that the usual signals of approach will be seasonably given." (45 Mo. 262.) This decision was affirmed, all the justices concurring, in *Taber v. Missouri Valley Railroad Company*, 46 Mo. 353.

The rule of law upon this subject is very clearly and, in our judgment, correctly stated in *Shearman & Redfield on Negligence*, sec. 31, as follows: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. He has a right to assume that every one else will obey the law, and to act upon that belief. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or to refrain absolutely

Opinion of the Court—Hawley, C. J.

from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances."

But the right to assume that the railroad company would properly perform its duty does not shield the plaintiff from the exercise of ordinary care and prudence on his part. The fact that the locomotive and tender of defendant was being carelessly and negligently moved backwards, without any signal being given of its approach, does not, of itself, authorize plaintiff to recover damages. If plaintiff, notwithstanding the negligence of the railroad company, recklessly exposed himself to danger, and it appears that the injury complained of would not have occurred but for his own misconduct or negligence, he cannot recover damages, but must bear the consequences of his own folly.

When the plaintiff rested his case, the proof was uncontradicted that the bell was not rung, and that no signal of any kind was given. A *prima facie* case of negligence upon the part of the defendant was clearly established.

The remaining question is whether the injury complained of was caused solely by the negligence or improper conduct of the defendant's employees, or whether the plaintiff so far contributed to the injury by his own negligence or want of ordinary care and prudence that, but for such negligence or want of care and caution, the injury would not have happened. (*Lewis v. Baltimore and Ohio Railroad Company*, 38 Md. 589; *Baltimore and Potomac Railroad Company v. Jones*, published in *The Reporter*, vol. v, No. 5.)

Did the plaintiff exercise proper care, or was it an act of negligence upon his part to take the chances of walking along the railroad track at a time when he knew that owing to the snow upon the rails, both sound and sensation of motion, ordinarily produced by an approaching train, was deadened, if not entirely destroyed, and that owing to the severe gusts of wind and the falling snow, he could not see more than fifteen or twenty feet in front of him, and was

liable at any moment to be deprived from seeing any distance at all? The plaintiff testified that he knew he was in some danger, but he knew that he was in a position where he could hear the bells; that he knew it to be the usual custom of defendant to either ring its bell or sound its whistle, and that he was carefully listening for the usual signal of an approaching engine, and looking ahead at all times, except when momentarily deprived of sight by the severe gusts of wind.

Having the right to walk upon the track, the plaintiff was only required to do what a reasonable and prudent person would ordinarily have done under the same or similar circumstances.

We are of opinion that it would have been clearly erroneous for the district judge to have decided as a question of law, under all the facts and circumstances of this case, that plaintiff was guilty of negligence. It was a question for the jury to decide. It addressed itself to each individual juror: Would you, as a reasonable man, in the exercise of ordinary care and prudence, have acted as the plaintiff did on the morning in question? "Negligence, as I understand it," says Cooley, C. J., in delivering the opinion of the court in *Detroit and Milwaukee Railroad Company v. Van Steinburg*, 17 Mich. 99, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person, under a given set of circumstances, the prudence of the party injured must be estimated, in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another, which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of differ-

Opinion of the Court—Hawley, C. J.

ent persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

If, therefore, the question of negligence arises upon a state of facts in regard to which reasonable men might honestly differ, it ought to be submitted to the jury. Whenever there is any doubt or uncertainty the question becomes one of fact, and must be left to the unbiased judgment of a jury of twelve impartial men.

There are, of course, many decided cases which hold that when the facts, showing the want of ordinary care on the part of the plaintiff, are clear and undisputed, the question of negligence is one of law, to be decided by the court; such, for instance, as driving recklessly upon the railroad track, at a crossing, after being informed that the cars are coming (*Mackey v. New York Central Railroad Co.*, 27 Barb. 528); where the cars are in plain view of persons upon the track, and the plaintiff, with a bag of shorts upon his shoulder, that obstructs his view and prevents his hearing, undertakes to cross the track (*Rothe v. Milwaukee and St. Paul Railway Co.*, 21 Wis. 256); where the plaintiff could both have seen and heard the approaching train and neither looked nor listened. (*Bellefontaine Railway Co. v. Hunter*, 33 Ind. 336; *Wilcox v. Rome, Watertown and Ogdensburgh Railway Co.*, 39 N. Y. 358.) So where the plaintiff went upon the private right of way of a railroad company, where she had no right to be, and walked carelessly upon the track without looking or listening for an approaching train (*Chicago, Rock Island and Pacific Railroad Co. v. Houston*, published in the Reporter, vol. 5, No. 6, and many other cases of a kindred character). But nearly all the numerous authorities cited by the respective counsel admit—if the question is at all discussed—that if the evidence is doubtful, and the

inferences to be drawn from it questionable, it is for the jury to determine whether the act of plaintiff contributed to the injury.

In *Railroad Company v. Stout*, the supreme court of the United States say: "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is to be the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one

Opinion of the Court—Hawley, C. J.

man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." (17 Wall. 663.)

The following authorities, in addition to those already cited, fully sustain the action of the court in refusing to grant a nonsuit: *Richmond v. S. V. R. Co.*, 18 Cal. 351; *Schierhold v. N. B. and M. R. Co.*, 40 Id. 447; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *D., L. and W. R. v. Toffey et al.*, 38 N. J. (Law), 525; *Hackford v. N. Y. C. and H. R. R. Co.*, 43 How. Pr. 222; *Bradley v. B. and M. R.*, 2 Cush. 539; *Chaffee v. B. and L. R. Corp.*, 104 Mass. 108; *Wheelock v. B. and A. R. Co.*, 105 Id. 203; *Gaynor v. Old Colony and Newport R. Co.*, 100 Id. 208; *F. and R. Branch R.*, 116 Id. 537; *Craig v. N. Y., N. H. and H. R. Co.*, 118 Id. 431; *Renwick v. N. Y. C. R. Co.*, 36 N. Y. 132; *Delafield v. U. F. Co.*, 5 Robt. 210; *Penn. R. Co., v. Ogier*, 35 Penn. St. 72; *Maginnis v. N. Y. C. & H. R. R. Co.*, 52 N. Y. 215; *Penn. R. R. Co. v. Barnett*, 59 Penn. St. 259; *The Lehigh Valley R. R. Co. v. Hall*, 61 Penn. St. 361; *Webb v. P. & H. R. R. Co.*, 57 Me. 117; *Wyatt v. Citizens R. R. Co.*, 55 Mo. 485; *Smith v. Union R. R. Co.*, 61 Mo. 588.)

2. Did the court err in refusing to grant a new trial upon the ground that the verdict was against the weight of evidence?

From the view we entertain of this case it is unnecessary to follow counsel in their discussion of the question of fact whether plaintiff could have safely walked along E street in the vacant spaces between the tracks of the railroad. If he had the right to walk on the track, if he was at a place where he had the right to be, then the question whether it would have been safer for him to have been elsewhere, is immaterial.

It was shown upon the part of defendant that it had obtained from the city authorities permission to lay its tracks and run its locomotives and cars on said street, and it is claimed that it had thereby obtained the exclusive right to all that portion of the street covered by its tracks, and that plaintiff, in walking thereon, was a trespasser. Is this position correct? Is it true that any distinction exists, or ought

to exist, between railroads propelled by steam and street railroads propelled by horse-power? Does the mere fact that vehicles cannot be safely drawn along a steam railroad prohibit the use of the track by foot-travelers? We think not. In our judgment, Solen had the same right to pursue his regular route as defendant had to run its locomotives. "They each have a right," say the court in *Kennayde v. Pacific R. R. Co.*, *supra*, "to exercise their privileges in a lawful manner, and each are equally bound to use caution, care and diligence to avoid accidents. But, so far as this case is concerned, conceding that the resolutions of the board of aldermen, in granting the right of way to the railroad company, is valid (a question which we have not examined, and do not decide), it is not necessary to base our opinion solely upon this ground.

The testimony is undisputed that the general public were permitted to use the tracks as a public thoroughfare. The great body of the miners engaged at work upon three of the most important mines situate upon the Comstock lode have been accustomed for years, at all hours of the day and night, in storm and sunshine, to walk to and from their work on the railroad tracks. No testimony was offered upon the part of the defendant tending to show that such a use had been made of its tracks without its knowledge or consent. The testimony was of such a character as to authorize the inference of an implied license on the part of the railroad company—treating it as the owner of the land—to allow pedestrians to walk over and along its tracks.

In *Delaney v. The Milwaukee and St. Paul Railway Company*, it was argued that plaintiff was a trespasser, because the place where he was injured was not a highway crossing, but the private grounds of the railroad company. But the court held that, as applied to the evidence, the proposition was not correct. The evidence established the fact that there had been a practical crossing over the place where the plaintiff was injured, for a long time, with the knowledge of the agents of the company. It did not appear that the company ever forbade any one from going there, or took any steps to put an end to persons going upon its

Opinion of the Court—Hawley, C. J.

grounds at that point. The court said: "These and other facts appearing in the case, show beyond controversy that the plaintiff was not wrongfully on the crossing where he was injured, and it is incorrect to view the relative duties of the parties upon any such assumption." (33 Wis. 71.)

In *Kansas Pacific Railway Company v. Pointer*, the facts were in many respects similar to this case. The court, in discussing this point, said: "The plaintiff had a right to show that the place where he was injured was on a public street of Leavenworth; and if he could not show that it was a public street in law, he still had the right to show that it was a public street in fact. And for this purpose, if for no other, he had a right to show that the public travel was on or over this ground, and to show that such travel was there with the knowledge and consent of the railway company. If he should show that the place where the injury occurred was on a public street, either in law or fact, he would not be such a trespasser as would relieve the railway company from exercising reasonable and ordinary care and diligence towards him. In fact, he would not be a trespasser at all. The railway company, in such a case, would be bound to run its trains with reference to him, and to every other person who might be rightfully occupying the street. Such persons would have the same right to be on the street as the railway company. In fact, in this case, the legal right of the railway company, and that of the public, to use the ground as a street, seems to be about equal. Both derive their right from a city ordinance. The public used this ground for a street, however, long before the railroad was built. If the plaintiff and the railway company each had a right to use said ground, then it was incumbent on each alike to use ordinary care and diligence to prevent and avoid injuries." (9 Kan. 628; see, also, *Shearman & Redfield on Negligence*, sec. 491.)

The testimony upon the part of the defendant tended to show that the bell was rung, and, hence, to establish the fact that defendant was not guilty of negligence.

Martin, the engineer of the defendant's locomotive, in his testimony says: That when the J. W. Bowker started from

the freight-house switch, "McDermott, the same who testified in this case, was sitting on the fireman's seat with his left hand holding the bell-rope. I said: 'D—n it, ring that bell;' and he rung the bell." He says, that "while Solen was lying between the tracks on his left side, McDermott, standing by the right side of him, * * said to Solen: 'I was ringing the bell myself.' Solen said: 'Why didn't you ring your bell or blow your whistle,' * * and McDermott said: 'D—n it, man, I rung the bell myself!'" James Boyd, a brakeman in the employ of defendant, testified to the same effect.

The conductor, John M. Duncan, in his testimony, says, that when he told the engineer to start: "McDermott was sitting on the fireman's seat. I think he had hold of the bell-rope, but I am not willing to swear whether he was ringing the bell or not." Upon cross-examination, in reply to the question: "Who rung the bell?" this witness said: "I cannot testify that I really heard the bell. I couldn't testify that I heard it ringing. I wouldn't be willing to testify that I did or did not hear it ringing." In reply to other questions he said: "The whistle didn't sound from the time we stopped at the freight-house. I am sure the whistle didn't sound."

William Hill, an employee of defendant, was standing on the corner of the platform at the freight depot, and after the engine commenced backing up he says that he asked a man by the name of Caldwell, who was then standing by him, if he could hear the bell, and he remarked he could not. "I says, 'They are ringing the bell,' and he said I saw him pulling the rope, but I couldn't hear the sound of the bell." This witness also corroborates Martin and Boyd, as to the remarks made by McDermott to Solen, that the bell was rung. There were some other points of minor importance in the testimony offered by defendant, tending to disprove portions of McDermott's testimony. Counsel for appellant claims that McDermott was successfully impeached; that the jury erred in finding a verdict so overwhelmingly against the testimony, and that the court erred in not setting the verdict aside.

We are not willing to accept the position, so earnestly contended for by appellant's counsel, that it was a physical impossibility for any man of ordinary sagacity to have been run over by a locomotive moving backward at the rate of four miles an hour; that plaintiff must have been recklessly and carelessly breasting the storm, utterly heedless of the impending danger, and that the mere fact that he was injured is enough to warrant this court in declaring him guilty of contributory negligence, notwithstanding the verdict of the jury, and the action of the district court refusing to set the verdict aside.

There was, in our judgment, a direct conflict of evidence upon the most material question of fact involved in this case.

As already mentioned, several of the witnesses for the defendant testified that McDermott rung the bell, and that he so stated the fact to be (to plaintiff) at the time of the injury. If the jurors believed this testimony to be true they ought not to have found a verdict against the defendant. But, on the other hand, it is to be observed that McDermott testified just as positively that he did not ring the bell, and that he did not make the remarks attributed to him at the time of the accident. His testimony is corroborated by the plaintiff, who, knowing that he was on the track of a railroad where engines and trains were hourly passing, that owing to the severe storm he could not see the approach of a locomotive, and realizing the fact that he was exposed to danger, was listening for the sound of the bell, and did not hear it. The plain inference to be drawn from the plaintiff's testimony if believed by the jury, was that the bell was not rung; that if it had been rung the plaintiff would have heard it, and the accident would not have occurred. Two of the defendant's witnesses, Martin and Boyd, who swore positively that the bell was rung, were themselves in fault if it was not rung, Martin being an engineer and Boyd a brakeman on the engine at the time of the accident. The corroborative evidence is not free from doubt and comes also from the employees of the company. The plaintiff is a man of sound mind, of ordinary intelligence and judgment,

and it cannot reasonably be presumed that he would have made a willing and wanton sacrifice of his life. On the other hand, the presumption would seem to be irresistible that he would not have been injured if he had been notified, by the ringing of the bell, of the close proximity of the locomotive and tender. But in any event, the conflict raised a question of fact which the plaintiff had the right to have determined by the jury. (*Renwick v. N. Y. Cen. R. Co.*, 36 N. Y. 132; *Artz v. C., R. I. and P. R. Co.*, 44 Iowa, 284.)

If the district court, upon weighing all the evidence, entertained the opinion that the verdict was clearly against the great preponderance of evidence, it had the power, and it was its duty, to set the verdict aside. This court, in *Phillpotts v. Blasdel*, declared that *nisi prius* courts had "jurisdiction on motion for a new trial, to decide, as a question of fact, whether the scale of evidence, which leans against the verdict, very strongly preponderates." (8 Nev. 76.) The district courts ought, however, always to use great caution in the exercise of this power, and they should be careful not to invade the legitimate province of the jury "when they have manifested a fair and intelligent consideration of the evidence submitted to them." (*Dewey v. C. & N. W. R. Co.*, 31 Iowa, 373.)

But it is not the province of this court, as it is of the district court, to weigh the evidence in order to determine the preponderance thereof. Our duty ends when it is discovered that there is ample evidence in the transcript sufficient to sustain and justify the district court and trial jury in the conclusions they have reached. (*State of Nevada v. Yellow Jack & S. M. Co.*, 5 Nev. 415; *Lewis v. Wilcox*, 6 Nev. 215; *Longabaugh v. V. & T. R. Co.*, 9 Nev. 302; *State of Nevada v. C. P. R. Co.*, 10 Nev. 49.)

The general rule upon this subject has been (as was said in *McCoy v. Bateman & Buel*, 8 Nev. 127) "so often reiterated as to become somewhat monotonous."

We have examined all the testimony set forth in the record, with the care which the importance in this case demands, and are unwilling to say that there is not sufficient legal evidence upon which the jury might reasonably con-

Opinion of the Court—Hawley, C. J.

clude that the plaintiff did not, by any negligence on his part, contribute to the injuries he received, and that the accident which caused the injuries complained of occurred by reason of the negligence of defendant in not giving the usual and proper signal.

The testimony is contradictory and irreconcilable, and, following the rules heretofore announced by this court, a new trial upon this ground should not be awarded. We cannot invade the province of a jury. Every litigant, under our laws, has the legal right to have his case, upon questions of fact, submitted to and determined by a jury impartially selected from the citizens of the county, and some consideration must always be shown to the conclusions reached, otherwise the right of a trial by a jury would be but a farce and a delusion. Whether we would have arrived at the same verdict it is impossible for us to tell. We cannot undertake to say which of the witnesses should be credited and which disbelieved, nor determine upon which side the weight of evidence preponderates. It was the duty of the jury and *nisi prius* court to determine these questions, and we are bound to presume that they have performed their duty with fidelity and with a conscientious desire to exact justice between the respective parties. Better opportunities were afforded them, by the presence of the witnesses, to judge correctly of their credibility and to determine therefrom as to the weight of the evidence than we can possibly obtain from reading the testimony. Surely, it requires no argument to establish this self-evident truth. Everybody knows that a clearer conception and better understanding of the testimony is always obtained from hearing it as it is delivered from the lips of a witness, and observing his demeanor while on the witness stand, than could ever be obtained by an examination of the testimony written out by a reporter at the trial. There is oftentimes more in the manner of a witness in giving his testimony than in the matter testified to that convinces the minds of the jury of the truth or falsity of his statement. The jury having decided the weight of evidence to be in favor of the plaintiff and the district court having approved

the verdict, we will not disturb their decision upon this question.

3. Is the verdict of the jury excessive? Does it appear from all the facts and circumstances of this case that the damages awarded by the jury are so excessive as to convince us that the verdict was "given under the influence of passion or prejudice?" (Compiled Laws, 1256, subdivision 5.) Is it manifest that the jury adopted any erroneous principle in arriving at the amount of the verdict? Is there anything to justify the assertion of appellant's counsel that the minds of the jurors must have been warped by sympathy for the plaintiff or controlled by enmity toward the defendant? We think these questions must all be answered in the negative. What are the facts? The plaintiff, thirty-four years of age and a miner by occupation, thus details the injuries he received: "I was thrown under the rails and dragged a little distance. I was injured by having a leg amputated and a collar bone broken. I think some of my ribs were broken. * * * I had very severe pains through my breast and sides. I was confined to my bed five or six weeks, and cannot now do any kind of hard work. My right shoulder is broken; it don't trouble me only at times when I go to lift anything heavy; can't handle anything. I can use it without much pain until I go to use it to lift something heavy. My right shoulder and arm are disabled and have been so ever since the accident. I cannot walk far without fatigue. * * * I have no means of making my living except by my personal labor."

For these injuries, resulting, as the jury found, from the negligence of the defendant, plaintiff was awarded fifteen thousand dollars.

The argument of appellant's counsel that the judgment should be confined to the simple question of plaintiff's avocation and the compensation limited or extended to a sum which would produce as great an income as he could have earned, by pursuing such avocation had he not been injured, ignores the right of the jury to award damages for the bodily suffering of plaintiff which all the authorities admit is proper to be considered by the jury in determin-

ing the amount of damages that plaintiff is entitled to recover.

There being no absolute, fixed, legal rule of compensation, appellate courts ought not to interfere with the verdict unless it clearly appears that there has been such a mistake of the principles upon which the damages were estimated, or some improper motive or bias indicating passion or prejudice upon the part of the jury. (*Worster v. Proprietors of Canal Bridge*, 16 Pick. 547; *Boyce v. Cal. Stage Co.*, 25 Cal. 461; *Schmidt v. M. and St. P. R. Co.*, 23 Wis. 195; *Klein v. Jewett*, 26 N. J. Eq. 480; *Penn. R. Co. v. Allen*, 53 Penn. St. 276; Segdwick on the Measure of Damages, 601, 602, and authorities there cited.)

The amount of the verdict—although perhaps greater than we would have given—is not, in our opinion, inconsistent with the exercise of an honest judgment upon the part of the jury whose special province it was to determine this question.

4. The instructions given by the court were certainly as favorable to the defendant as the law would warrant. We have repeatedly declared that the instructions must be read together and considered as a whole. When so read and considered with reference to the evidence, we are satisfied that the jury could not in this case have been misled to the defendant's prejudice. A verdict ought never to be set aside simply because some expressions of the court, in its charge to the jury, might in some particulars, when considered apart by themselves, be susceptible of verbal criticism, which, when taken and considered with the other portions of the charge, could not possibly have misled a jury of ordinary intelligence. (*Whalen v. St. L. K. C. and N. R. Co.*, 60 Mo. 323; *Railway Co. v. Whitton*, 13 Wal. 290.)

In conclusion, we are of the opinion that the whole case was properly tried and fairly submitted to the jury; that the verdict is sustained by the evidence; that the court did not err in refusing to set it aside, and that a new trial ought not to be granted.

The judgment of the district court is affirmed.

Opinion of Hawley, C. J., on rehearing.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, C. J. :

1. The argument of appellant's counsel upon rehearing is principally based upon the proposition that E street, in Virginia City, where the accident occurred, is not a public street.

It is contended that the evidence shows conclusively that the *locus in quo* was in the private and exclusive use of the defendant as a yard and terminus, and that the plaintiff in traveling over it was a mere intruder—a trespasser upon the property of the defendant.

We are of opinion that the pleadings admit it to be a public street. It is so alleged in the complaint, and is not denied by the answer. But independent of the pleadings, the proof offered by appellant, as well as the testimony submitted on the part of plaintiff, clearly establishes the fact that E street was a public street opened to all foot passengers, and that the public had been accustomed at all hours of the day and night to walk thereon. To decide this case, therefore, upon the ground that it was not a public street would be introducing “a false quantity into the calculation,” a quantity which neither the pleadings nor proofs sanction.

2. It is again urged that the plaintiff was negligent, and that his negligence contributed proximately to the injuries which he sustained. Numerous authorities have been cited with the assertion of counsel that “in none of these cases was the negligence of the plaintiff greater than in the case at bar.” We have re-examined “these cases” with care, and shall notice them in the order presented by counsel for appellant.

The Ill. Cent. R. Co. v. Godfrey, 71 Ills. 500, was decided upon the ground that Godfrey, at the time of the accident, was a trespasser upon the private grounds of the railroad company and was therefore bound to use extraordinary care. In examining the testimony, however, it will be discovered that the plaintiff said that “when he went on to the road he looked and saw no engine.” The court said: “This was

Opinion of Hawley, C. J., on rehearing.

not enough. He should have kept constant watch while he was traveling along the track, for the approach of an engine. If the plaintiff had looked he could have seen the engine in time to have avoided the accident. Moreover, plaintiff was walking in the space between the tracks, and as the engine approached, to quote the language of one of the witnesses, "he just looked like he staggered up against the engine."

Fleming v. W. P. R. Co., and *Roth v. M. and St. P. R. Co.*, were sufficiently noticed in our former opinion.

In *Hickey v. B. and L. R. Co.*, 14 Allen, 429, it was held that a passenger in the railroad cars could not maintain an action against a railroad company for injuries sustained by him in consequence of his voluntarily and unnecessarily leaving his seat and standing in an exposed condition upon the platform of the passenger car, while the train was in motion.

In *C. and R. I. R. Co. v. Still*, 19 Ills. 508, a collision occurred while Still was attempting to drive a two-horse team and wagon over the railroad track at a regular crossing. The facts were that Still "was sitting down in the bottom of the wagon, with his back turned in the direction from which the cars were approaching, so as to prevent his seeing them." It also satisfactorily appeared "that by looking in the direction of the cars, he could have seen them for a considerable distance, and for a sufficient length of time to have avoided all damage; and that the sound of the approaching train could be heard for a distance sufficient to give ample time to have prevented this collision." It also appeared from all the positive testimony in the case that the railroad company rung its bell for the usual distance, and that a headlight was burning. Under such circumstances, the court very properly said that the plaintiff "having placed himself in a position that prevented him from being able to see the approach of the cars, and having tied up his ears in a manner that must have prevented his hearing the approach of the trains, is certainly guilty of gross negligence."

In *Dascomb v. B. and S. L. R. Co.*, 27 Barb. 227, "the

Opinion of Hawley, C. J., on rehearing.

plaintiff, living about a fourth of a mile from the railroad track, owning a farm divided by the track, leaves his house, with a horse and wagon, taking in his son and hired man, and drives along, upon a trot, directly upon the track of the road, without taking the slightest precaution to ascertain the dangerous proximity of the locomotive. This was negligence."

In *N. P. R. Co. v. Heileman*, 49 Pa. St. 60, the plaintiff, Heileman, was seated far back in his covered wagon, with the curtains closely drawn down, and drove his horse and wagon slowly upon the track in front of the passing locomotive, and a collision occurred. If plaintiff had looked out of his wagon, as he was bound in law to do, he could have seen the railroad track for seventy-five yards. He failed to use his eyes to the best of his ability, and was therefore held guilty of negligence.

In *Runyon v. C. R. Co.*, 25 N. J. L., 556, the plaintiff had lived for thirty years within three hundred yards of the railroad. He was driving toward the track on a slow trot, sitting down in an open wagon, with his back towards the direction in which the train was coming. In describing the facts of the collision to a witness he said: "He did not think of the road; his mind was enveloped in thought; * * he could not tell what he was thinking of; * * * as he heard the whistle he gave his horses a pull, and they went ahead rather faster than before." Had he looked he could have seen along the railroad track for a distance of several hundred yards. This being the evidence in relation to plaintiff's conduct, the court said: "It is entirely clear that he failed in showing ordinary care and diligence on his part to avoid the injury. In fact, it appears that he did not exercise any care or precaution whatever. He never even thought of it."

In *Steves v. O. and S. R. Co.*, 18 N. Y. 422, the testimony, as in the preceding case, presents an instance of surprising negligence and inattention on the part of the plaintiff. "After riding along parallel to and in plain sight of the railroad track for the distance of about a mile, he undertook to cross the track, his horses being upon a walk.

Opinion of Hawley, C. J., on rehearing.

The day was cold and the wind blowing fresh from the north-west. He was traveling against the wind. His coat was turned up around his ears and a fur cap drawn down over them. With his hearing thus obstructed, and with abundant opportunity to see and avoid the approaching train, if he would but look, he advanced slowly upon the track." A court in such a case ought not to hesitate in saying, as was said by the court in this case, that "such negligence, such indifference to danger, is both unaccountable and inexcusable."

In *Wilcox v. R. W. and O. R. Co.*, 39 N. Y., 358, the plaintiff's intestate was killed while attempting to cross the track at a regular crossing. The evidence failed to show whether the deceased, before attempting to cross, looked up and down the track to ascertain whether a train was coming; but it did appear that the engine or train was in plain sight for a distance of seventy or eighty rods; and the court held, that under all the circumstances attending the transaction, it was a fair and reasonable presumption that he did not look, "for had he done so, he must have seen the engine approaching, and he could have escaped, and his life would have been saved." In the language of Grover, J.: "To walk along or stand upon a railroad track, without availing himself of the sense of sight as well as hearing to ascertain whether there was danger in such position," was negligence.

In *Havens v. E. R. Co.*, 41 N. Y., 296, there was evidence tending to show, that by looking the train could have been readily seen and the danger thus avoided. The supreme court held, that such evidence having been given, the lower court erred in not instructing the jury: "That an omission to ring the bell, or blow the whistle, would not excuse the deceased from the observance of proper care on his part, and that this care required him to look for trains when he had opportunity so to do, while riding in the wagon." A principle that is well settled and was clearly stated in our former opinion to be the law.

In *Wilds v. H. R. R. Co.*, 29 N. Y., 315, the plaintiff's intestate had an opportunity to see the train if he had

Opinion of Hawley, C. J., on rehearing.

looked. This was made certain, as the court say, "upon the testimony of every witness who has spoken on the subject. That he did, in fact, see it at some time before the collision is evident, from the testimony of all the witnesses to the principal fact, for they swear he whipped his horses in order to get across before the engine should reach him." It also appeared, beyond controversy, that a flagman was stationed between the two tracks with a flag when the train and the deceased were approaching the spot where the collision happened;" and that he did "his whole duty by displaying his flag and warning passengers off."

This, in short, is one of the many cases to be found in the books where persons driving teams, seeing a train coming, determine to try the speed of their horses against that of the approaching train. In all such cases the courts have universally declared that the plaintiff is not entitled to recover.

In the *T. and W. R. Co. v. Goddard*, 25 Ind. 185, a case often referred to by appellant's counsel, suit was brought by Goddard to recover damages for injuries to his horses and wagon. As Gilpin (the driver) approached the track of the Chicago road with the team, a locomotive on one of the tracks of that road, with its bell ringing and making the usual noise, was about to cross the plank road; Gilpin increased his speed, thinking to pass before the locomotive, but the latter passed the crossing before him, and within ten or fifteen feet of the horses' heads. While the engine was passing the horses were somewhat excited. They were then, at most, within three or four rods of the track where the accident occurred, but Gilpin drove on at a rate of speed of six miles an hour until the collision occurred. * * * Gilpin did not stop the team, or even slacken his speed, for the purpose of ascertaining if the track was clear before approaching or attempting to go on it; nor is there any evidence that he used any of his senses, or any precaution whatever, to ascertain whether a train was approaching." In examining the details of the testimony in this case, it is apparent that the court was correct when it said that the team "was run against the train, and not the train against the team."

Opinion of Hawley, C. J., on rehearing.

We have referred thus at length to "these cases"—all that were cited by appellant on the last argument—for the purpose of showing, as we think, the facts, when fairly considered, fully warrant that in each of them the negligence of the plaintiff was much greater than the alleged negligence of Solen in the case at bar.

We recognize, without indorsing all that has been said by the courts, the general principle in the cases cited, that the plaintiff is bound to use proper care to avoid danger; that his prudence or imprudence is to be measured in proportion to the danger, and that the greater the risk, the greater the degree of care required. And if the undisputed facts in this case were so clear as to satisfy us that Solen did not use that degree of care which an ordinarily reasonable person would have used under similar circumstances, we should not hesitate to say that the district court erred in refusing to grant a nonsuit. But as to this, more anon.

3. Counsel for appellant again contend that it was, and is, our duty to decide, as a question at law, whether the plaintiff was guilty of contributory negligence.

It was not without some doubt and hesitation, and only after the most careful examination of all the authorities then cited by the respective counsel (and they embraced all, or nearly all, that are now relied upon, and several others that were not referred to in the re-argument of this case), that we arrived at the conclusions announced in our former opinion. We were then, and are now, aware that there is a great diversity of opinion to be found in the books. Courts of last resort have apparently gone to extremes upon both sides of this vexed question. If reason is the soul of the law, then our own common sense and judgment, amidst the conflict of the decisions upon this subject, must, after all, furnish the only true guide to its proper solution. Nevertheless, we propose once more to examine the authorities.

Appellant relies upon the rule as announced by Wharton in his work on Negligence, as follows: "The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from

Opinion of Hawley, C. J., on rehearing.

the jury when the facts are disputed and the evidence is conflicting." (Section 420.)

In considering this question, it must be understood that the same measure of justice, the same rule of conduct, and the same principle of law, applies to the plaintiff as to the railroad company. It must also be remembered that if the *locus in quo* is a public street or thoroughfare, then it is held in nearly all the authorities, and admitted by counsel for appellant, that (independent of any statutory provision) under the rules of the common law, it is the duty of the railroad company to ring its bell or sound its whistle; and if it fails to perform its duty in this respect, it is guilty of negligence. It is equally as well settled that it is the duty of the passenger or traveler going across or upon the track of a railroad company, to exercise reasonable care and diligence upon his part to avoid danger; and whenever such a person undertakes to cross over, or walk upon a railroad track (even where he has a right to be), without looking or listening for the approach of a locomotive or train, he is guilty of such negligence as to deprive him of the right to complain of the negligent conduct of the railroad company. In these and kindred cases, it is the duty of the court, as stated by Wharton, to take the case from the jury, and to decide as a question of law that the plaintiff was guilty of contributory negligence.

But there is another line of cases, far more numerous, of which the case under consideration is one, where the undisputed testimony leaves it doubtful to the mind of the court whether the plaintiff did use reasonable care and prudence. In such cases, the authorities almost universally agree that it is the duty of the court to submit the question to the jury. In the language of Morton, J., in *Wheelock v. Boston and Albany Railroad Co.*, "When the question, whether the plaintiff was using ordinary care, depends upon a variety of circumstances, and the inferences to be drawn from them as to the effect which they would have upon the motives and conduct of men of the usual prudence and intelligence, and it cannot be said, as a matter of common knowledge and experience, that the plaintiff was careless, then the law

Opinion of Hawley, C. J., on rehearing.

refers the question to the judgment and experience of the jury." 105 Mass. 206.

In *Penn. C. Co. v. Bentley*, the facts were not disputed, and it was urged there, as here, that upon the undisputed facts negligence was a question of law. The supreme court, in answering this argument, said: "There is no such principle, except where a man violates a plain legal duty." (66 Penn. St. 32.)

In *W. C. and P. R. Co. v. McElwee*, the same court say: "The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury, and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care." (67 Penn. St. 311.)

All the authorities cited, under this head, in our former opinion sustain the general doctrine that the question of ordinary care is in most cases, even where the testimony is undisputed, a question of fact which it is peculiarly the province of the jury to determine, under proper instructions from the court. This principle, in our judgment, is well settled by the great preponderance and weight of authority, and is sustained by the common sense and sound judgment of the ablest jurists in the United States.

The question upon which the conflict of authorities, previously alluded to, arises, is not so much upon the existence of the rule as to its application in any given case. It must be acknowledged that it is not always easy to decide as to which class of cases the given one belongs. Hence, it very naturally follows that jurists, learned in the law, as well as jurors, unskilled in the science of the profession, differ as to what constitutes ordinary care in a given case.

Whenever, upon a given state of facts, there is reasonable room for doubt, for honest minds to fairly differ, both parties have the right, in our judgment, to have the question submitted to a jury.

By following this rule a judge would always have his separate and distinct duty to perform as well as the jury. It would be the province of the jury to find the facts and of the court to declare the law. But if we adopt the rule so

earnestly contended for by appellant, then, in the administration of justice, there would be no use whatever for a jury. The testimony upon the part of plaintiff in actions of this character, generally leaves the main facts undisputed. If then, from that simple fact alone, it becomes the duty of the *nisi prius* judge and appellate courts to always decide the question of negligence as one of law or of mingled law and fact, a jury trial would indeed be but a mockery and a farce.

In *French v. T. B. R. Co.*, as the plaintiff approached the crossing, a freight train was passing; and after the last car had passed she attempted to cross. She was driving with care and watching the road. She heard no signal and received no warning. At a point forty-six feet from the center of the track she could have seen up the track forty-six feet; at thirty feet from the crossing she could have seen the track for a long distance. She did not look in that direction when she reached those points, and gave as a reason that she did not suppose that one train would follow so closely upon another. The court, in considering these facts, said: "Whether the plaintiff was in the exercise of that due care which persons of common prudence and intelligence would exercise when placed in a similar situation, and whether she was careless in failing to look up the track at the points near the crossing where it was visible, was a question for the jury to determine in the peculiar circumstances of the case." (116 Mass. 541.)

In *Craig v. N. Y., N. H. and H. R. Co.*, the deceased was prevented by the buildings on either side of the highway from seeing the approaching train until he had driven upon the railroad track. The place was one across and near which engines and cars of all kinds were constantly moving. The gates were not shut across the highway, and there was no flag or lantern at the crossing, as had been the usual custom when the gates were not shut. The supreme court said: "The question whether he was negligent in proceeding in the manner he did, instead of stopping his horse, or turning about and driving back, was a question of fact for the jury." (118 Mass. 437.)

Opinion of Hawley, C. J., on rehearing.

In *Maloy v. N. Y. C. R. R. Co.*, the court said: "Whether it was negligence in the plaintiff to walk upon the sidewalk in a dark night, without a light, was a question of fact for the jury and not a question of law for the court." (58 Barb. 184.)

In *Seigel v. Eisen et al.*, the supreme court refused to declare as matter of law "that the conduct of the plaintiff, in standing on the rear platform of the street car and steadying himself by holding the rail of the platform, was contributory negligence." (41 Cal. 111.)

In *Johnson v. W. and St. P. R. R. Co.*, the defendant asked the court to charge the jury, "that inasmuch as the evidence is undisputed that the plaintiff, of her own accord, placed her foot upon the links connecting the two cars together between the bumpers, such act of hers was negligence on her part, and she cannot recover." The lower court refused to so charge, and its action was sustained by the supreme court: "Whether, under the circumstances in which the said plaintiff was situated, it was negligence, is a mixed question of fact and law. Negligence and prudence are relative terms, qualified by the country, the age, the relations and circumstances in which an act is done or omitted. The law can give no certain fixed standard by which a jury shall be governed in inquiries of this character, for the simple reason that there is none; it only professes approximation to a standard. These questions are eminently practical, and are, says Story, more questions of fact than law." (11 Min. 306.)

In *Sehierhold v. N. B. and M. R. R. Co.*, 40 Cal. 447, the plaintiff's intestate was playing in the street, and found himself suddenly before the car of the defendant, and to avoid being run over, ran against a pile of timber (which the defendant had caused to be piled within eighteen inches of the track), was turned back by it and run over. The district court granted a nonsuit on the ground that the negligence of the deceased contributed to the accident. The supreme court, following the principle announced in *Needham v. S. F. and S. J. R. R. Co.*, 37 Cal. 410, held that the court erred in granting the nonsuit. The court

Opinion of Hawley, C. J., on rehearing.

say: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts." In this case the evidence was clear that the defendant's car was being driven in the most reckless and culpable manner. On this point the court said: "We are not satisfied that, notwithstanding the negligence of the deceased, the injury might not have been avoided by the exercise of proper diligence on the part of the defendant. And besides, it may not have been negligence on the part of the deceased to attempt to cross the track at the distance before the horses testified to, had they been driven at the proper speed and under the proper control of the driver."

So in the case at bar, was it not a question of fact, for the jury to decide, whether it was negligence for the plaintiff to walk upon the railroad track in the manner and at the time he did, relying upon the presumption that the railroad company would use due and reasonable care in moving its locomotives and trains and give due and timely notice, by the usual signals, of their approach.

In *Maginnis v. N. Y. Cent. and H. R. R. Co.*, a train was moving backward, at night, without a light or any signal or warning at the rear, upon the defendant's track, which ran through a public street in the city of Albany. It had so nearly stopped, that to one in the rear no motion was perceptible. The plaintiff's intestate attempted to cross the street, in the rear of the train, when the speed of the train was increased, and she was run over and killed. The *nisi prius* court declined to nonsuit the plaintiff, and the court of appeals sustained its action; because, although the train did not come to a full stop, "it might be inferred that it was at the point of stopping, and that the intestate, in looking at it, was justified in supposing it to be standing still, and consequently justified in crossing the street; and

Opinion of Hawley, C. J., on rehearing.

that, although there was no great suddenness to the motion, it was accelerated in order to pass Quackenbush street; and that the absence of a visible light or other means of warning at the rear end of the train while being backed through a public street of the city, constituted a sufficient fault on the part of the company to render them liable for the injury." (52 N.Y. 220.)

Upon the same principle it must be admitted that the negligence of the defendant, in this case, in not ringing its bell, or giving any signal or warning, rendered it liable for the injury to plaintiff, unless the plaintiff was guilty of negligence that contributed proximately to such injuries. And it cannot, it seems to us, upon any substantial reason, be denied that the undisputed facts were not as sufficient to authorize the court in this case as in the case last cited, to submit the question of plaintiff's conduct to the jury.

Take the case of *L. V. R. R. Co. v. Hall*, where the plaintiff's intestate was found dead on the railroad track between seven and eight o'clock in the evening, the night being dark. "Two coal trains belonging to the company, one coming down and the other going up, passed each other a square or two below Linden street. The down train had a head-light, the up train, by which the deceased was killed, had no head-light, and gave no warning of its approach by bell, whistle, or other signal, as it passed through the town."

There was no direct or positive evidence that the deceased either looked or listened for approaching trains. The court held that under the circumstances the case could not be withdrawn from the jury; that "it was their province to deal with the facts, and to draw from them the proper conclusion;" that the court could not assume that Hall's negligence "contributed to his death, and that it was not occasioned by the negligence alone of the company's agents in charge of the train." Again, in the course of the opinion, the court say: "If the train was without a head-light, and without giving any other notice or warning of its approach, might not the jury infer that his death was occasioned by the recklessness of the company's agents in thus running the train rather than by any want of care on his part in not

Opinion of Hawley, C. J., on rehearing.

observing it in time to avoid danger." (61 Penn. St. 368.) The court refused to adopt the argument there, as here, contended for by appellant, that the person injured must have been guilty of negligence "because he was struck by the passing train."

Now, in applying the principles of that case to this, would it not logically follow that inasmuch as the undisputed testimony of Solen did establish, to the satisfaction of the court, that he was looking whenever he could and was listening for the sound of the whistle or bell (it being a place where the railroad company, in the exercise of due care, was bound to give such warning) and could have heard such a signal if any had been given, that it was the negligence of the defendants' agents in failing to give the usual and proper signal that caused the accident, "rather than by any want of care on his part in not observing" the locomotive "in time to avoid danger."

Was it not the duty of the court, under these circumstances, to submit the questions at issue to the jury?

Was it not the province of the jury, in this case, as well as the case last cited, "to deal with the facts, and to draw from them the proper conclusions?"

In *Hackford N. Y. Cent. and H. Riv. R. R. Co.*, the plaintiff's intestate was killed while driving his team across the railroad track. "It was a very stormy day, snow was falling and the wind was blowing very hard. The street, along which the deceased was driving * * * crosses the track at nearly right angles. The deceased was going west; the engine by which he was struck was moving north at about twenty miles per hour. There was no sign up, indicating that there was a railroad crossing at the place of the accident—the sign that had been up having been removed. A carman, with furniture in his cart, crossed the track just before the deceased attempted to cross; there were other teams approaching the track from the east. The drivers of the other teams stopped, seeing the approaching engine, and cried 'whoa' to the deceased just before he got on to the track; the deceased did not regard it, but drove on and was instantly struck and killed. * * * As the engine ap-

Opinion of Hawley, C. J., on rehearing.

proached the track the bell was not rung, nor was the whistle blown." The *nisi prius* court granted a nonsuit. The supreme court said: "The court committed a grave error in refusing to submit the question of concurring negligence of the deceased to the jury." (43 How. Pr. 245.) A new trial was granted and the court of appeals affirmed this judgment. (53 N. Y. 654.)

Numerous other cases might be cited where courts have refused to grant a nonsuit under circumstances showing as great a degree of negligence, or want of care, on the part of plaintiff, as was shown in this case. But we have certainly referred to enough to establish the fact that the views expressed by us in our former opinion are in accord with the great weight and current of the authorities upon this subject.

4. It is claimed that the court erred in instructing the jury as follows: "In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger." Instructions of this character are usually given only in cases where the facts fail to disclose the conduct of a deceased person. But we do not think appellant has any reasonable ground to complain of the language used. It was one of the tests by which the plaintiff's proven conduct was to be measured. It being "the known and ordinary disposition of men to guard themselves against danger," such conduct would be presumed in the absence of proofs to the contrary. (*Johnson v. H. R. R. Co.*, 20 N. Y. 65; *Gay v. Winter*, 34 Cal. 153; *N. C. R. R. Co. v. State of Maryland*, 29 Md. 438.) But when the facts are disclosed it is then the duty of the court and jury to determine whether plaintiff's conduct in the given case did show that he had used proper care to guard himself against danger. Viewing this instruction in the strongest possible light against the appellant, it could only be considered that in support of plaintiff's conduct, as proven, it was the duty of the jury to take into consideration the fact that plaintiff, as a reasonable man, would naturally guard against danger; that his

Opinion of Hawley, C. J., on rehearing.

testimony was, therefore, natural and reasonable; that he must have listened and looked whenever he could (as he testified he did), and that it would be unnatural to consider his testimony false because it accorded with the known and ordinary disposition of men.

The only way the jury had of determining whether the plaintiff used due care was to bring to their aid, in connection with the proven facts, their own knowledge of the common sense and experience of mankind. (*Ernst v. H. R. R. Co.*, 35 N. Y. 29; *Beisiegel v. N. Y. C. R. Co.*, 40 N. Y. 29; *L. S. and M. S. R. Co. v. Miller*, 25 Mich. 274; *Smith v. H. and St. J. R. Co.*, 37 Mo. 292.)

The portion of the instruction complained of does not, in our opinion, authorize the jury to presume anything in favor of the plaintiff, in opposition to the facts established by his testimony.

5. It is also claimed that the court erred in instructing the jury, that "in cases of this character the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury."

We agree with appellant, that it would in most cases be proper for the court to instruct the jury substantially, as laid down in *Shearman & Redfield on Negligence*, sec. 606, that the plaintiff might, in cases of this character, "recover the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." But the appellant in this case is not in a position to complain of the action of the court in this particular. If it desired to have this rule given as a guide to the jury, it ought to have prepared an instruction embodying the correct principle upon this subject, and asked the court to give it. (*Gaudette v. Travis*, 11 Nev. 149.) Unless the instruction as given is erroneous, or calculated to mislead the jury, we are not authorized to reverse the case upon the ground that the court did not as fully instruct the jury as it might, and no doubt would have done had its attention been called directly to the point in controversy.

Opinion of Hawley, C. J., on rehearing.

The jury, under the rule, heretofore stated and admitted to be correct by appellant, was authorized to give plaintiff "a fair compensation for the physical and mental suffering caused by the injury;" and in determining this question, as we have already said, much must necessarily be left to the good sense and sound judgment of the jury.

In addition to the authorities cited in our former opinion upon this point, we think *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. N. B. and M. R. Co.*, 36 Cal. 590; and *City of St. Paul v. Kuby*, 8 Minn. 171, fully sustain the court in giving the instruction complained of.

In *Wheaton v. N. B. and M. R. Co.*, Sanderson, J., in delivering the opinion of the court said: "In cases of this character, as we had occasion to say in *Aldrich v. Palmer*, 24 Cal. 513, the law does not prescribe any fixed or definite rule of damages, but from necessity, leaves their assessment to the good sense and unbiased judgment of the jury." This opinion also sustains our action in refusing to set aside the verdict as excessive.

The verdict of the jury, say the court, "will not be disturbed on motion for a new trial, unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or as to suggest, at the first blush, passion or prejudice, or corruption on the part of the jury."

In *Heil v. Glanding*, cited and relied upon by appellant, the lower court instructed the jury, that as there was no certain rule by which to estimate the damages for plaintiff's personal injury, "the jury will fix them at such sum as they think proper and right from the evidence." Upon an examination of the opinion, it will be noticed that the court only said that inasmuch as the case had to go back for another trial, on account of errors upon other grounds, it would be proper for the court to give a "more precise instruction" as to the measure of damages, as a guide to the jury.

In that case, as here, there was no prayer for an instruction on this point, and the court expressly say: "We would not reverse the judgment were there no other misdirection

Opinion of Hawley, C. J., on rehearing.

than in what we said respecting the measure to be adopted by the jury." (42 Penn. St. 499.)

This opinion, instead of being opposed to our views fully sustains them. It is evident that the judgment ought not to be reversed upon this ground.

6. Upon the other points, again urged by appellant, but little need be said. They—as well as the questions relating to contributory negligence—were as ably and fully presented on the first argument as on the last, and were then carefully considered by the court. Our views remain the same. The expression used, in our former opinion, that if the plaintiff was at a place where he had a right to be, then the question “whether it would have been safer for him to have been elsewhere, is immaterial,” must be taken with reference to the facts of this particular case, and considered in connection with the acknowledged doctrine—recognized in all parts of the opinion—that it was his duty, while walking upon the railroad track, to use due and reasonable diligence and exercise ordinary care and prudence to avoid danger.

Of course, the plaintiff could have avoided all injury by keeping away from E street; and, as the result shows, “it would have been safer for him to have been elsewhere.” No man is in any danger of a collision with the locomotive or cars of a railroad company if he keeps a sufficient distance from the tracks of the road, and never attempts to walk upon or across the street through which the cars and locomotives of a railroad run. But the people of Virginia city have the lawful right to be upon the public streets, if they exercise due care, notwithstanding the fact that a right of way has been granted to the railroad company to lay its tracks and move its locomotives and trains thereon. No sidewalks had been provided whereon the foot passenger could walk with safety. There was also some testimony tending to show that the railroad company had to some extent obstructed the space between the tracks by leaving piles of lumber thereon. Moreover, the testimony showed that the ground between the tracks was rough and unbroken in places, and on the morning in question was entirely cov-

Opinion of Hawley, C. J., on rehearing.

ered over with snow, while between the rails of the main track, where plaintiff was walking, it was level and pretty smooth. Under all these circumstances the mere fact that there was "space enough" for a man to walk between the main track and the side tracks was "immaterial." If there had been a proper sidewalk provided for the accommodation of foot-passengers, there would have been some foundation for the position sought to be maintained by appellant, that plaintiff "unnecessarily" walked upon the track.

The question whether positive testimony outweighs negative, as held in *Mackey v. N. Y. Cent. R. Co.*, 27 Barb. 539, and *C., B. and Q. R. Co. v. Stumps*, 55 Ill. 367, has no special application to the facts in this case.

The testimony of McDermott is as clear, direct, and positive, that he did not ring the bell as is the testimony of any of appellant's witnesses to the contrary. There is nothing in his testimony, or in the transcript, which would authorize us to say, as counsel for appellant contend, that he "is unworthy of belief." That question was submitted to the jury, and it was by them declared that his testimony was true.

In the consideration of this case, we have proceeded upon the ground that the jury were intelligent men, capable of judging of the weight that ought to be given to the testimony of the respective witnesses, and that they understood the principles of law as announced by the court.

Although our views may not have been as clearly expressed as if written by other and abler hands, yet we have no fear that any principle decided in the former opinion, or in this, will ever return "to vex the court" in its impartial administration of the law.

The judgment of the district court is affirmed. Remittitur forthwith.

Statement of Facts.

[No. 831½.]

GEORGE G. WATERS, RESPONDENT, v. C. C. STEVENSON, APPELLANT.**DAMAGES FOR EXTRACTING ORE FROM MINES—COMPLAINT CONSTRUED—**

TRESPASS OR TROVER.—The complaint in this case construed: *Held*, sufficient to support a judgment for damages as to the value of the ore in place in the mine, or its value after being separated from the mine.

IDEM—LEASE REQUIRING ROYALTY.—Waters, the plaintiff, leased certain mines to one Armstrong under an agreement that he should receive a royalty of from one dollar and fifty cents to two dollars and fifty cents, proportioned to the value of the ore, for each and every ton of ore extracted. During the existence of this lease, Stevenson, the defendant, claimed to have entered upon the leased mines in ignorance of the dividing lines thereof, and extracted therefrom certain quantities of ore, which he milled and converted to his own use. Armstrong subsequently assigned his lease to the plaintiff, Waters: *Held*, that the court did not err in refusing to charge the jury to include in the defendant's expenses, to be deducted from the gross yield of the ores, the amount per ton that Armstrong was obliged to pay plaintiff as royalty. That plaintiff's rights are just the same as Armstrong's would have been had he brought this action in his own name.

IDEM—MEASURE OF DAMAGES—EXPENSES OF EXTRACTING THE ORE TO BE DEDUCTED—COMPENSATION.—*Held*, upon a review of the facts of this case, that the court erred in instructing the jury not to include in defendant's expenses, to be deducted from the gross yield of the ore, the necessary cost of mining the ores; that in all actions sounding in tort no fraud or culpable negligence appearing, the injured party is entitled to full compensation for his losses, and no more.

APPEAL from the District Court of the First Judicial District, Storey county.

The defendant, after having introduced evidence tending to show the gross amount and value of the bullion which could be extracted from each ton of said ore, for the purpose of showing the real value of the ore, proposed to prove the cost per ton of extracting and working the same, and for this purpose his counsel asked of defendant while on the stand as a witness, the following question: "What was the necessary expense per ton of digging down the ore taken by you from the Trench and Bowers mine?" To which plaintiff's counsel objected, on the ground that the only expense which could properly be allowed to defendant as a deduction

Argument for Appellant.

from the gross yield, was the expense necessarily incurred after the ore had been picked down upon the floor of the mine. The court sustained the objection and excluded the testimony, and ruled that no proof could be offered as to any expense incurred or necessary to be incurred before the ore was so picked down from its place in the mine. To which ruling the defendant then and there duly excepted.

The facts are stated in the opinion.

C. J. Hillyer, for Appellant.

The recovery in this action should have been limited and measured by the actual loss sustained by the plaintiff, that is to say, the value of the ore as it stood in the mine, or its proceeds, less the necessary cost of mining and reducing. The following authorities were cited and reviewed in appellant's brief: *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 Id. 671; *Wood v. Morewood*, 43 Eng. Com. Law R. 810; *Morgan v. Powell*, Id. 736; *Hilton v. Woods*, Eq. Cases, vol. 4, (L. R.) 432; *Mueller v. St. Louis and Iron Mountain R.*, 31 Mo. 262; *Maye v. Tappen*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 484; *Stockbridge Iron Company v. Cone Iron Works*, 102 Mass. 86; *Forsyth v. Wells*, 41 Pa. St. 291; *Lykens Valley Coal Company v. Dock*, 62 Id. 239; *United States v. Magoon*, 3 McL. 171. In this state all distinctions of form are abolished. We have but one form of civil action. The reasons given in the common law cases for the rule of damages contended for by respondent, are not applicable to actions under our system. As to the intrinsic justice of the rule for which we contend, there can be no serious question. If one person inadvertently injures the property of another, all that the injured party can reasonably ask is full compensation for the injury. He should be made whole and nothing more. He should have returned to him the full value of that of which he has been deprived, and nothing beyond this. Anything in addition is not compensation but punishment. The moment that it is conceded that a party may recover something more than compensation, the amount of the recovery becomes either indefinite or arbitrary.

Argument for Respondents.

Take the present case. The plaintiff is the assignee of a lessee of a mine, and can only recover in the right of his assignor. The lessee, by the terms of his lease, had a right to possess the mine for a specified time, and within certain bounds to take out as much or as little ore as he should please, paying to his landlord a royalty on that taken out. The defendant by mistake crossed the line, and took out some ore within the bounds of the same. What injury has the lessee sustained thereby? Certainly nothing more than the profit which he could have made out of this ore, had it remained undisturbed in the mine. If he could have made no profit out of it, he could have lost nothing. Yet the court instructs that although he could have made nothing out of it, he can nevertheless recover for it something of the defendant, or that if he could have made something, he shall recover in addition to this an amount equal to the cost of timbering and digging down the ore. That is, the plaintiff shall not only not lose anything by this accidental trespass, but may make it the source of actual profit; in this case, in fact, as shown by the verdict, the only profit which he could in any manner have realized.

The court below erred in modifying the instruction asked by defendant. The plaintiff stands in this action in the place of Armstrong, his assignor. Armstrong, by his lease, had the privilege of taking out ore, and was to pay from one dollar and fifty cents to two dollars and fifty cents per ton to his landlord for all that he did take out. It is evident that if we wish to ascertain just what Armstrong lost by the act of defendant, we must deduct from the gross proceeds the amount which he would have been compelled to pay as royalty.

Lewis and Deal, for Respondents.

I. The court below adopted the most favorable rule for appellant. The weight of authorities and the analogies of the law are clearly in favor of this rule. (2 Greenleaf on Evidence, section 276; *Ellis v. Wire*, 33 Ind. 127; *Ewart v. Kerr*, 2 McMullan, 141; *Jenkins v. McConico*, 26 Ala. 213.) No man should be allowed to compel another to pay for

Argument for Respondents.

labor which he voluntarily performs, without the knowledge of the persons upon whose property such labor is bestowed. This is a fundamental rule of the law of contracts.

Waters could have recovered the ore in question in an action of replevin, wherever he could find it, even in the hands of an innocent purchaser, as he could recover any other personal property. Neither Stevenson or his vendee could, in such a case, demand or claim the cost of mining, hoisting, or hauling. Why then should he be allowed to deduct such cost in an action of this kind? Under our practice, where but one form of action exists, what reason can be given for allowing a deduction for labor, etc., in the one case, and not in the other? The measure of damages in an action of trover or trespass is the value of the property at the time of conversion. (*Boylan v. Huguet*, 8 Nev. 345; *Carlyon v. Lannan*, 4 Nev. 156.)

The very earliest period at which the conversion in this case took place was when the ore became personal property. Hence, the plaintiff was entitled to the value of the ore at the time it was picked down, or when it became personal property capable of conversion. (Sedgwick on Measure of Damages, sec. 477-479; *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Penn. Cent. R. R.*, 49 N. Y. 303; *King v. Orser*, 4 Duer, 431; *Yater v. Mullen*, 24 Ind. 277; *Ripley v. Davis*, 15 Mich. 75; 13 Fla. 501; 20 Wis. 152; 26 Conn. 389; 30 Vt. 307.) The least damage ever allowed in cases like the one under consideration is the value at the time of severing the ore, or its becoming personal property. (*Kier v. Peterson*, 41 Penn. St. 357; *Martin v. Porter*, 5 M. & W. 351; *Cushing v. Longfellow*, 26 Me. 306; *Bennett v. Thompson*, 13 Ired. L. 146; *Smith v. Gonder*, 22 Ga. 353; Bainbridge on Mines, 514; 3 Ad. & El. 278; 32 Ill. 207; Sedg. on Dam. 670; 13 Ind. 46; 23 Cal. 306.) A man is bound to know the boundaries of his mining claim. (*Maye v. Tappen*, 23 Cal. 306.) There can be no legal excuse for a trespass of this kind, and a person committing it must necessarily be treated as willfully committing the wrongful act. The sum which Armstrong was to pay to Waters should not be deducted in estimating

Opinion of the Court—Leonard, J.

the measure of damage. (Bainbridge on Mines, 6-9; *Wild v. Holt*, 9 M. & W. 671.)

By the Court, LEONARD, J.:

The record in this case discloses the following material facts: On or about the second day of October, 1871, plaintiff was the owner, and in possession of a certain mining claim in Gold Hill mining district, in this state, known and called the Bowers claim, and was in possession, and entitled to the possession, as lessee thereof, of a certain mine known and called the Trench mine. On the day stated, plaintiff leased a portion of each of said mines to one Armstrong, for the period of twenty months; that is to say, from October 1, 1871, until June 1, 1873. By the terms of the lease Armstrong had the right, at his own cost and expense, to enter upon and take possession of both of said mines, from and including the surface, to and including the five hundred-foot level of each, and extract therefrom all metalliferous ores he might desire to take, and convert the same to his own use. Armstrong agreed to pay plaintiff for each and every ton of ore extracted and taken which would mill fourteen dollars per ton, the sum of one dollar and fifty cents; and for each and every ton so extracted and taken which would mill fourteen dollars and upward to sixteen dollars, the sum of two dollars; and for each and every ton so extracted and taken which would mill over sixteen dollars per ton, the sum of two dollars and fifty cents. Armstrong also agreed to take all ore from the mines which would mill twelve dollars per ton, and to work the ore taken within sixty-five per cent. of the assay value. By the terms of the lease no rights were reserved by plaintiff, the lessor, other than the privilege of having access to the mines at all times, for the purpose of inspecting the same, and the right to declare the lease forfeited at his option, in case of failure to make payment for the ores excavated and taken away. It does not appear that plaintiff declared a forfeiture of the lease, nor is it denied that the lease was in full force until the end of the term. Armstrong agreed to work the mines in a good, workmanlike

Opinion of the Court—Leonard J.

manner, and return the machinery leased in connection therewith in good working order, ordinary wear excepted. He agreed, also, upon the expiration of the term, to surrender said mines, with the dumps, cars, tools, and appurtenances, to plaintiff. Armstrong took possession of both mines and the other property mentioned, under the lease, and engaged in extracting and taking out ores.

Defendant admitted in his answer, and at the trial, that he entered upon a portion of each of the mining claims leased to Armstrong, subsequent to the date of the lease, and that he mined and converted to his own use a certain number of tons of metalliferous ores containing gold and silver; but he denied that he did it willfully or intentionally, and alleged that his entry upon the said mining claims was the result of inadvertence and mistake, under the *bona fide* belief that he was mining within the boundaries of his own adjoining mines. The verdict of the jury was in favor of defendant's alleged *bona fides*. On the ninth day of April, 1873, Armstrong, for a valuable consideration, sold and assigned to plaintiff both leasehold interests before mentioned, and on the twenty-third day of June, 1874, for a valuable consideration, sold and assigned to plaintiff all claims and demands of every nature and kind which he had against defendant described in the complaint herein.

The main question presented for our consideration is as to the proper measure of damages in a case of this kind. In the court below defendant contended that the recovery should be limited to, and measured by, the value of the ore in place, as it lay in the mines before his entry; that plaintiff should recover only the gross proceeds of the ores extracted and worked by defendant, less the necessary cost of mining, assorting, hoisting, transporting and milling, and that plaintiff was not entitled to recover the amount agreed by Armstrong to be paid to plaintiff as royalty. The court held, and so instructed the jury, that if defendant by mistake, and not willfully, wrongfully extracted ores from the mines being worked by Armstrong, plaintiff should recover their gross yield, less the necessary expense of assorting, transporting, hoisting, hauling and milling, and all other

Opinion of the Court—Leonard, J.

necessary expense after the ore was picked down in the mine.

Defendant requested the court to instruct the jury to include in his expense the amount per ton which Armstrong, by his agreement, was obliged to pay plaintiff for the privilege of extracting the ores, but this instruction was refused. It is urged by counsel for defendant that the court erred in charging the jury to exclude from his necessary expenses, to be deducted from the gross yield of the ores, the necessary cost of mining, and the amount per ton agreed to be paid by Armstrong to plaintiff.

Plaintiff claims to recover under and by virtue of the assignments from Armstrong, and it is admitted by counsel on both sides that he can recover, in this action, the same amount that could have been recovered by Armstrong, had no assignments been made, and no greater sum.

Counsel for defendant claims that this is an action of trespass for damages done to real estate; while counsel for plaintiff seem to treat it as trover or trespass *de bonis*, at least they urge the adoption of the same rule of damages as they assert is the true rule in those cases.

It is alleged in the complaint: "That in the month of November, 1871, one W. H. Armstrong was in the lawful possession of, and until about the ninth day of April, 1873, continued in the lawful possession, by virtue of a certain leasehold interest therein, of all that portion from the surface down to and including the 500-foot level or adit of that certain mining claim, quartz vein or lode situated in Gold Hill mining district, * * * known and called the 'Bower's claim,' and described as follows: * * * and said Armstrong was entitled, by said leasehold interest in his own right, to all the gold and silver-bearing ores and earth therein, from the surface to said 500-foot level or adit; that plaintiff was, at all the dates hereinbefore and hereinafter mentioned, the owner of the mining claim, quartz vein, or lode above described; that while said Armstrong was so in the possession and entitled to the possession, by virtue of his said leasehold interest in the same, to wit, on or about the thirteenth day of May, 1872, said defendant

Opinion of the Court—Leonard, J.

wrongfully and willfully entered into and upon said mining claim and ledge aforesaid, above the 500-foot level or adit thereof, and commenced extracting, and did extract, take and wrongfully carry away from said mining ground, * * * within five hundred feet of the surface thereof, large quantities of valuable metalliferous ores containing gold and silver, to wit, one hundred and sixty tons of the value of four thousand dollars, and did deprive said Armstrong thereof; that but for the wrongful act of the defendant, as aforesaid, the said Armstrong would have had and received all the aforesaid metalliferous ores * * * to his own use, under and by virtue of said lease; that by reason of the premises said Armstrong was damaged by defendant in the sum of four thousand dollars in United States gold coin."

Plaintiff then, in substantially the same language, states another cause of action against defendant by reason of his alleged willful, wrongful, and unlawful entry upon the said Trench mine, and extracting and carrying away therefrom four hundred and eighty tons of metalliferous ores, containing gold and silver of the value of twelve thousand dollars.

It is then alleged, as applicable to both causes of action, "That said Bowers claim, * * * and the said Trench mine were, at the times aforesaid, and are only valuable for and on account of the metalliferous ores bearing gold and silver, which were imbedded therein." * * * * *

As we regard the cause, it is a matter of no practical consequence which theory is technically correct as to the form of the pleadings. The result, in any event, must be in accordance with the facts alleged and proven. The action is brought to recover damages for certain unlawful acts performed by defendant. It is brought upon the whole case, and all the facts constituting plaintiff's cause of action as to each mine, are stated in one count. It is said in *Jones v. Steamship Cortes*, 17 Cal. 487, that "every action under our practice may be properly termed an action on the case." Our statute provides that "the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language. If a recovery of

Opinion of the Court—Leonard, J.

money or damages be demanded, the amount thereof shall be stated." (C. L. sec. 1192.) The complaint charges that defendant willfully and unlawfully entered upon the mines described, and willfully and unlawfully extracted therefrom and converted to his own use six hundred and forty tons of ores, of the value of sixteen thousand dollars, to plaintiff's damage in the same sum. A cause of action is stated by an allegation of the facts, and the alleged amount of damages is demanded; and whether the pleader intended to allege trespass to the land, or trespass *de bonis*, or trover, the result is that the plaintiff is entitled to recover just such damages as are allowable from the facts alleged and proved, which make up the whole case. The amount, of course, will depend upon the rule adopted in ascertaining the true measure.

The facts stated in the complaint are sufficient to support a judgment for the damage sustained, whether that be the value of the ores in place, or after they were separated from the mines.

It is said by counsel for defendant that the court erred in refusing to charge the jury to include in his expenses to be deducted from the gross yield of the ores, the amount per ton that Armstrong was obliged, by the terms of the lease, to pay plaintiff as royalty. In this connection it is especially important to keep in mind the fact that plaintiff's rights are just the same as Armstrong's would have been had the latter brought this action. By the terms of the lease, for twenty months, Armstrong had the same right to work the mines mentioned as had plaintiff before the execution of the lease. He could excavate, carry away, and mill all the ores contained in the portion of the mines described in the lease. The right of possession was in him exclusively. He could have maintained an action against all persons disturbing his possession or trespassing upon the premises, including plaintiff himself. He could have used force necessary to resist defendant's entry or his removal of the ores, or he could have invoked and received the aid of the law for his protection. Plaintiff could not have maintained trespass for an injury done to the land,

Opinion of the Court—Leonard, J.

because the possession and right of possession were exclusively in Armstrong.

Armstrong had the right to give defendant permission to mine and carry away the ores. So, if defendant wrongfully entered and worked the mines without his permission, his right was to allow him to do so and take his chances of recovery in an action for damages, instead of working them himself, or instead of making forcible resistance to his entry or resorting to legal process for the protection of his property. It is true that under the lease Armstrong had the privilege of taking out as many tons as he pleased and no greater number; but his right to the whole was just as absolute and inviolable as it would have been had he positively agreed to mine all the ores in the mines. During the life of the lease, an unlawful entry was a disturbance of the rights and possession of Armstrong alone, and every pound of ore taken belonged to him and not to his lessor. Had the taking of ores been prohibited by the terms of the lease, they would have become the property of plaintiff as soon as they were detached from the mines; but the right of mining and appropriating the ores having passed to Armstrong, the right, as well as the remedy for its infringement, remained in him until the assignment to plaintiff. (Taylor's Landlord and Tenant (5 ed.), secs. 173-4-5-6-7-8; Washburn on Real Prop. Vol. 1, marg. p. 314; *Attersol v. Stevens*, 1 Taunton, 200; *Schermerhorn v. Buell*, 4 Denio, 425.) But while the lease gave Armstrong the rights stated, he could not avail himself of them, either by taking out the ores himself, or by receiving satisfaction therefor from defendant, without fixing his own liability to plaintiff according to the terms of the lease. Such being the case, it is not necessary to decide whether Armstrong would or would not have been liable to plaintiff in an action for waste on account of the ores taken by defendant. (*Attersol v. Stevens*, *supra*; *Cook v. Champlain T. Co.*, 1 Denio, 104; Taylor's Landlord and Tenant, secs. 178, 343 *et seq.*, 689; Smith's Landlord and Tenant, 268; *Austin v. H. R. Co.*, 25 N. Y. 340.) If Armstrong had sold his right to the defendant to work these mines, and had received the contract

Opinion of the Court—Leonard, J.

price therefor; or if, after discovering his mistake, defendant had paid Armstrong for the ores wrongfully taken, there can be no doubt that plaintiff could have recovered of Armstrong the full amount of royalty stated in the lease. In either case, the fact that Armstrong had received satisfaction from defendant, would have been proof that the former claimed the benefits of the lease as to the ores mined by defendant, and that he recognized the validity of plaintiff's claim against him according to the terms of the contract. He could not derive the benefits of the lease without assuming the burden it imposed. Had he without suit received satisfaction from defendant, the money received, as between him and plaintiff, would have taken the place of the ores, and he could not have escaped payment on his covenant for all ore taken. Possession and right of possession having been in Armstrong, and the ores, both in and out of the mine, having been his property, he would have had an undoubted right to bring this action. Had he done so, and obtained satisfaction against defendant by the law's aid rather than by agreement, the result would have been precisely the same as that before stated. In either case he would have been liable to plaintiff for the amount agreed to be paid. Had Armstrong brought this action, then defendant could not have included the royalty in his expense to be deducted from the gross yield of the ores. His rights are no greater in an action brought by plaintiff, the assignee of Armstrong. (*Attersol v. Stevens, supra.*; *Wild et al. v. Holt*, 9 M. and W. 671.) It follows that the assignment of error just considered cannot be sustained.

The next and more important question to be considered is: Did the court err in instructing the jury not to include in defendant's expenses to be deducted from the gross yield, the necessary cost of mining of the ores?

We are of the opinion that in all actions sounding in tort, no fraud or culpable negligence appearing, the aim of the law is to award to the injured party full compensation for his actual losses, as the law defines those words, and nothing beyond that amount.

In *Buckley v. Buckley*, 12 Nev. 423, which was an action

Opinion of the Court—Leonard, J.

to recover the possession of personal property, or the value in case delivery could not be had, and damages for its detention, or the value of the use thereof, we held, if a return of the property could not be had, and its value had been appreciated by the labor and expenditure of the wrong-doer acting wrongfully but in good faith, that the latter should not be permitted to retain any profit, but that he should be allowed from the appreciated value, after the real owner had been fully compensated, all his expenses necessarily incurred in increasing the value of the property, if so much remained after the actual damages had been satisfied.

In *Ward v. C. R. W. Co. et al.*, subsequently decided, which was an action to recover the value of wood alleged to have been converted by defendants at Empire city, in this state, we held that the conversion was in Alpine county, California, where the wood was less valuable than at Empire city, and that plaintiff was entitled to recover the value of the wood at the former place, with interest, but not the enhanced value caused by the labor and expenditure of defendants; that such measure of damages fully compensated plaintiff's actual loss, and no greater sum should be awarded.

In both of those cases the value of the property was enhanced after the conversion, while in this case, the expenditure not allowed defendant by the court, and by which the value of the ores was increased, was incurred before they became personal property, and consequently before conversion was possible. But we can perceive no reason why the distinction between the facts of those cases and this can justify the adoption of a principle in the former that should not be adhered to in the latter.

It is said by counsel for plaintiff that no less stringent rule of damages should be adopted in trespass than in trover, and that in the latter action, the rule adopted by this court in *Boylan v. Huguet*, 8 Nev. 345, is the value of the property at the time of the conversion, with interest. That such is the general rule, there can be no doubt; and that it should be so is equally plain, because in most cases such an award makes full compensation for the injury com-

Opinion of the Court—Leonard, J.

plained of, and no more. In that case the court stated the general rule, and applied it to the case then under consideration. But it declared the governing principle to be "complete indemnity to the party injured, but no punishment to the wrong-doer."

The reason why the general rule stated was adopted, is because, in most cases, it approaches nearer making full compensation than any other; but we do not understand that this court has ever held that it is unvarying in its application, if in any case a departure from it will better accomplish the object of the law. It is well known that to the general rule there are many acknowledged exceptions. In *Pierce v. Benjamin*, 14 Pick. 361, the court says: "The general rule of damages in actions of trover is unquestionably the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule as plain and well established as the rule itself. Wherever the property is returned, and received by the plaintiff, the rule does not apply. And when the property itself has been sold, and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases, and justice forbids its application. In all such cases, the facts may be shown in mitigation of damages." And in *Baldwin v. Porter*, 12 Conn. 484, it is said: "Both the rule and exceptions proceed upon the principle that the plaintiff ought to recover as much, and no more, damages than he has actually sustained, which commonly is the value of the property; and hence the general rule. No good reason, consistently with moral principle, can be suggested why greater damages should ever be recovered than have in truth been sustained, except in those cases where the law permits by way of primitive justice, the recovery of vindictive damages." (See, also, *Curtis v. Ward*, 20 Conn. 206.) We agree fully with the principle announced by that court, and shall endeavor to apply it to this case.

Although entertaining the greatest respect for the courts that have held otherwise, we are unable to say in this case, where the verdict of the jury prohibits the imposition of

Opinion of the Court—Leonard, J.

exemplary damages, that the value of the ores when separated from the mines should be taken as a just measure of Armstrong's actual injury, rather than their value at the mill, or indeed the value of the gold and silver extracted, except that the first is a nearer approach to the true measure than the last. The question should be, and is, how much Armstrong lost by reason of defendant's wrongful acts complained of. It is alleged in the complaint that the mines were, and are, valuable only on account of the metalliferous ores of gold and silver imbedded therein; that but for the wrongful acts of defendant, Armstrong would have had and received all of said ores to his own use, under and by virtue of said lease. In other words, if defendant had not extracted the ores, Armstrong would have done so. If defendant had not expended his money in mining the ores Armstrong would have expended his own. So, too, it might be added that if defendant had not taken out the ores, transported them to the mill, and there separated the precious metals from the earth, in all probability Armstrong would have done so. He could not have realized any profits under his lease without sub-letting or working the mines himself. There is no allegation that defendant deprived him of the former privilege, and had he worked the mines, it is certain that the cost of mining the ores would have been an expense to him, as well as the transporting and milling, and that in ascertaining his profit, or the value of his estate under the lease, he necessarily would have deducted the first, as well as the second and third item of expense mentioned. If our object is to ascertain Armstrong's loss by reason of defendant's wrongful acts, we must, it seems to us, in this action, begin with the first act complained of, the unlawful entry, and compare Armstrong's rights and interests at that time, with what they were after the termination of the wrongs stated. We must confine our view to the condition of the property and the extent of Armstrong's property rights when their value was the measure of Armstrong's actual loss, rather than their value on a subsequent day, when the ores, instead of representing such loss, had been appreciated by defendant's labor.

Opinion of the Court—Leonard, J.

It was a matter of no practical importance to Armstrong whether defendant dug, carried away and milled the ores, or destroyed them in the mines. In either case his loss would have been the same. The conversion of the ores was only an intermediate act in a series, which accomplished the destruction of his property as it existed at the time of defendant's entry and the commission of the acts complained of. Had the ores been mined by Armstrong before defendant carried them away, Armstrong's loss must have been greater than it was after they had been mined by defendant. If so, the combined acts of defendant, in mining the ores and taking them away, were not as detrimental to Armstrong's interests as the last act alone would have been after the former had been performed by him. But it is said that the judgment is right, because Armstrong was entitled to the ores when separated from the mine; because he could have recovered them in specie; because defendant was a trespasser, and as such cannot receive anything for his expenditure. But, admitting all these things except the conclusion stated, if our object is to find Armstrong's actual loss, how do they all show that he or plaintiff should receive in damages not only the value of the ores as they were before defendant's entry, all either could have realized had he worked them, and as much more as was the cost of mining, but also that defendant should lose twice the expenses incurred? How can such a rule be justified in this action, when in trover or replevin the rightful owner, as a general rule, can recover only the value at the time of conversion, with interest, although the property has been appreciated in value by the labor of defendant? The same argument was used in the latter cases, in favor of giving the whole value to the plaintiff if the property was wrongfully taken from him, however innocent the acts of defendant might have been. But this and many other courts have decided against such a rule, as unreasonable, unnecessary, and unjust. The same courts have said that in replevin the rightful owner should have the property if he can get it, although appreciated in value by defendant; not because he can justly claim the whole, but because he is entitled to his

Opinion of the Court—Leonard J.

own, and generally, in such cases, he cannot get that without taking what has been added at the expense of the wrong-doer; that in such case the latter must lose, however innocent he may have acted; but that if the property cannot be returned, and damages have to be given for the wrong, there is no difficulty in doing justice to both parties, allowing the rightful owner his actual losses, and the other his expenses, in whole or part, as the appreciation may permit. In replevin, the property is at all times the plaintiff's, if it was so when taken, no matter how greatly appreciated in value; at all times he has a right to recover it in specie, and the defendant is a continual trespasser so long as he retains it. Then, if the property cannot be returned, why not give its increased value with as much propriety and justice, as in this action, to measure plaintiff's damages by the value of the ores when separated from the mine? We are unable to find any distinction in principle between the two cases. In both, plaintiff is only entitled to his actual loss. In neither is it necessary to give him more in order that he may have what belongs to him; and in both, if more is given, the plaintiff is allowed a profit by reason of an innocent misadventure of defendant.

It often happens in deserted mining towns that buildings become useless except to be taken down and removed to some other locality. In such cases they might easily be more valuable when taken down than they were when standing. Suppose, under such circumstances, in the honest belief that a certain building belongs to him, A. should take down the house of B. and appropriate the lumber to his own use; that it was worth one thousand dollars before it was taken down, and the lumber one thousand two hundred and fifty dollars afterwards. Suppose again that C., in the same belief that another house adjoining, and of the same value, belongs to him, burns and destroys it. It turns out that the house claimed and burned by C., also belonged to B.; B. brings an action against each, alleging in the first case an unlawful entry, the tearing down and carrying away, etc.; and in the other an unlawful entry, the unlawful burning and destruction. In the latter case it is certain

Opinion of the Court—Leonard, J.

that the maximum limit of recovery is the amount it would cost to replace the building, and it would not be that much if such cost would exceed its value. The value of each building was the same to B., and in each case, as to him, the result of the unlawful acts of A. and C., respectively, is the destruction of his property. Can it be possible, because A. took his down and carried away the lumber, thereby increasing its value, instead of destroying it, that B. can recover of him one thousand two hundred and fifty dollars, and only one thousand dollars from C.?

In *Harvey v. S. S. M. Co.*, 1 Nev. 543, appellant claimed error, because the court below refused to instruct the jury to give him what it would cost to remove from his lot dirt and rocks piled thereon by defendant. This court sustained the lower court, and stated in substance, that in some cases appellant might recover the amount it would cost to restore the property to the condition it was in before the wrong committed; but in cases where such cost would exceed in value of the property, the last amount only could be given in damages. In other words, plaintiff was not entitled to receive an amount greater than the value of the property destroyed by the trespasses of the defendant. So, in this case, if it were possible to replace the ores in the mines, as they were before defendant's entry, it is difficult to perceive how plaintiff could recover an amount greater than their value in place, if the cost of replacing them would exceed such value, or how he can now recover more than such value, although, from the character of the property, they cannot be put in their former position. If defendant had innocently flooded one of the mines in question and worked the other, so that Armstrong could not take ore from either, should not the same rule of damages govern each case? Three men own adjoining claims in a marble bed; A. and B., by mistake, work over the lines upon the property of C.; each takes out and appropriates to his own use the same number of perches of the same value in the bed; A. takes his in small blocks, and consequently expends less than B., who at great cost gets out large, valuable blocks, to be used in public buildings. The actual damage done to the marble

Opinion of the Court—Leonard, J.

bed is the same in each case, but the blocks separated by B. are, in aggregate, as much more valuable than those taken by A., as B.'s expense of separation was greater than A.'s. It seems plain to us that in separate actions like this the same rule of damages should govern both cases. With apparent candor it is urged by counsel for plaintiff that, if the cost of mining may be deducted from the gross yield of the ores, it must follow if Armstrong had taken possession of the ores without action, that defendant could have recovered from him the amount of such cost. We answer this statement of counsel by referring to what has been said in relation to the right of the owner of property to have it returned, if a return can be had, in an action of replevin. The rule and the reasons therefore are the same here as there. That every person has the right to use and manage his own property as he deems proper, so long as he does not injure others, cannot be doubted; but it must often happen that one man will, by mistake, overstep his line and trespass upon the rights of another. When such is the case our sense of justice and the law of the land declare that, as nearly as possible, the injured party shall be restored to his former condition, or compensation in damages shall be made. The wrong-doer shall make good the loss, but beyond that he shall not suffer for a wrong committed but not intended. We have endeavored, thus far, to consider this case upon well settled principles, without particular reference to the decided cases. Let us now look at the decisions upon this and kindred questions.

Our attention is called to the following cases by counsel for respondent: *Kier v. Peterson*, 41 Pa. St. 357, an action of trover for fifty thousand gallons of petroleum, which was the unexpected product of certain salt wells which had been sunk by defendant on land leased to him by plaintiff for the purpose of manufacturing salt. The court held that the petroleum belonged to the defendant, and hence did not consider the question of value, in relation to which there was no contest. Woodward, J., concurred in the judgment on the sole ground that plaintiff had misconceived his action, and alone remarked that he thought the judge below

correctly comprehended the measure of damages; that "plaintiff was not entitled to the labor of defendant but only for the value of the oil at the instant of separation from the freehold." It is probable that the court might have so held in that case, had the petroleum belonged to plaintiff, for the reason, that the defendant had expended nothing on account of that; he would have been to the same expense and trouble for the salt. *Martin v. Porter*, 5 M. & W. 353, was trespass for breaking and entering plaintiff's close, a coal mine, by mistake, and digging and carrying away coal. It is similar to this case, and so far as we know, has been and is, the foundation of the rule, among the decisions, claimed by counsel for respondent. Such being the case, and the leading opinion being short, we give it entire:

"LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he now claim to deduct it? He cannot set up his own wrongs. The plaintiff had a right to treat these coals as a chattel to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail." Barons Parke, Alderson and Maule agreed upon the grounds stated by the chief baron. It will be seen that this decision, like all that follow it, was based upon a principle not accepted by this court, viz.: "That if the owner cannot obtain his property in specie, he is entitled in all cases to the increased value.

Morgan v. Powell, 3 Adol. & E., N. S. 281, from the printed report, appears to have been similar to *Martin v. Porter*, although it is stated in *Cushing v. Longfellow*, 26 Me. 310, to have been an action of trespass *de bonis asportatis*. However, the court followed the rule adopted in the former case; Lord Denman C. J., and Patterson, Williams and Coleridge, JJ., sitting in banc. The case was first heard before Coleridge, J., at the Monmouthshire assizes in 1841, at which inquiry he stated that he felt bound by

Opinion of the Court—Leonard, J.

Martin v. Porter, though he expressed a doubt as to its correctness, and in a note to the case we find the following: "By a short-hand writer's notes, his lordship appears to have said: 'But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been to put him in the same position as he would have been if the coal had never been stirred.'"

In "Bainbridge on the Law of Mines and Minerals," marg. p. 514, the author says, in substance, that in actions of trespass for working beyond the boundaries of mining claims, the measure of damages is the full value of the minerals as soon as they are separated from the freehold; and, as authority for the rule, he refers to *Hilton v. Woods*, Law Rep. Eq. Cas., vol 4, p. 432; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Coleman's Appeal*, 62 Pa. St. 278; *Bennett v. Thompson*, 13 Ired. (Law) 146; *Lykens & Co. v. Dock*, 62 Pa. St. 232. An examination of the cases cited will show that *Maye v. Tappan* and *Bennett v. Thompson* are the only ones that in any manner sustain the rules stated by the author. But on p. 448 he says that, in equity, if there is no fraud or culpable negligence, compensation will be confined to actual profits accruing, or which might have been fairly acquired from the trespass; that the market price of the minerals at the mouth of the mine will be taken, and all just allowances be made for the costs of working. So it seems that the courts of equity in England, being untrammelled by forms, give as the actual damages in such cases the gross proceeds, less the necessary expenses of working, including the cost of mining. (*Wild v. Holt*, 9 M. and W. 671, follows *Martin v. Porter*.)

The above are all the English authorities to which we have been referred bearing upon this question in favor of respondent's position, and all that we have been able to find. The American cases cited by counsel for respondent are: *Cushing v. Longfellow*, 26 Me. 310, which was an action of *trespass de bonis asportatis*. The court held that the value

Opinion of the Court—Leonard, J.

of the logs sued for, at the time they were severed from the freehold, was the true measure of damages; that they then became a chattel, so that *trespass de bonis* would lie for them. The form of the action evidently effected the result. The last part of the decision is instructive, at least, as tending to show the growing inclination of courts to do justice by giving actual compensation for damages, sustained *Bennett v. Thompson*, 13 Ired. 148, follows *Martin v. Porter* and *Morgan v. Powell*, no other authorities being cited, and no reasons for the rule being given. The same is substantially true of *Smith v. Gondor*, 22 Ga. 353. *The Chicago So. Br. Dock Co. v. Dunlap*, 32 Ill. 210, may be entirely correct, but it is not in point in this case. Sedgwick on Dam., marg. p. 536 *et seq.*, is also referred to by counsel for respondent. The author there gives the English doctrine as laid down in *Martin v. Porter*, but in a note at p. 538 denies that such is the true rule, and strenuously adheres to that enunciated in *Forsyth v. Wells*, 41 Pa. St. 291. We cannot regard either *Maye v. Tappan*, 23 Cal. 306, or *Goller v. Fett*, 30 Cal. 485, as an authority giving the rule in that state. The first does, indeed, come to the conclusion contended for by respondent, but we are unable to comprehend how such a conclusion was arrived at, after reading other portions of the opinion. In the last case the court say: "The court erred also in refusing to permit defendants to prove the expense of digging the gold-bearing earth. The point was directly adjudged in *Maye v. Tappan*, 23 Cal. 306." Sawyer, J., justly distinguished for his painstaking, concurs in the reversal on the sole ground that defendant should have been permitted to prove the expense of digging the gold-bearing earth. But, as already observed, in *Maye v. Tappan*, the court adopted a rule directly opposite the one declared correct in *Goller v. Fett*, and yet the decision in the latter case seems to have turned upon the former. There is a mistake somewhere, and we can only disregard both.

Our particular attention is still called by counsel for respondent to the case of *The Barton Coal Co. v. Cox*, 39 Md. 3, decided in 1873. The facts of that case were similar to

Opinion of the Court—Leonard, J.

those presented in this, and the decision is favorable to respondent's theory.

The declaration in that case, however, was somewhat different from the complaint in this. It contained three counts. The first charged that the defendant broke and entered the *lotus in quo*, and mined and carried away large quantities of coal; the second and third set out the trespasses with greater minuteness, and charged that defendants then and there took and carried away and converted the coal to their own use. The court says: "The declaration contained three counts, which, so far as the distinctive forms of action can be recognized in our present system of pleading, may be designated as trespass *quare clausum fregit et de bonis asportatis* combined." So, it is evident that the pleadings in that case allowed the adoption of such a rule of damages as the court deemed proper in an action of trespass *de bonis*, while there is not such a count in the complaint in this case. Although we cannot know what the decision would have been had the declaration there been like the complaint here, we shall assume that it would have been the same if the second and third counts had been omitted, or if the second and third had been combined with the first. In the first place, the court holds (p. 22), that in an action of trover, where there is no fraud or culpable negligence, the plaintiff may recover the enhanced value of the material either at the place of taking or manufacture, a conclusion that finds no concurring opinion in this court. Had the court been of different mind upon that important question, it is improbable at least that it would have arrived at a similar decision upon the question under consideration. After stating that there is a diversity of opinion between the English and American cases, and that the latter cases are not uniform, the court cites *Forsyth v. Wells*, 41 Pa. St. 291; *Herdic v. Young*, 55 Id. 176; *United States v. Magoon*, 3 McLean, 171; *Goller v. Fett*, 30 Cal. 482; *Coleman's Appeal*, 62 Pa. St. 278; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 84; all of which are strongly against the decision made. The court then says: "In the absence of any adjudications in this

Opinion of the Court—Leonard, J.

state on the question, and the conflict of authorities in others, we must endeavor to deduce the principles which should govern in cases of this character from a condensed statement of a few leading cases in England, where this species of property has long been the basis of national wealth, and often the subject of judicial consideration."

The court then cites *Martin v. Porter*, *Morgan v. Powell*, and *Wild v. Holt*, and decides the case according to the rule adopted by the English cases cited. No reasons are given for preferring the rule followed in the English cases rather than in the American; but the decision seems to have been based solely upon the ground that the rule adopted had been declared to be the correct one by some of the English courts. As an authority, the case adds to the English decisions the approval of the Maryland court, which we highly respect, although unable to follow its example. *Robertson v. Jones*, 71 Ill. 405, was similar to this case. The appellate court held that the measure of damages for coal taken by defendant upon plaintiff's land was its value as a chattel when first severed from the mine. The foundation of this decision was also laid in a rule which, in *Ward v. Simpson*, we said "was not supported by sound reason or sustained by the weight of decided cases, and hence should not be followed." That court recognized as correct the rule that in trover and replevin the plaintiff may, in the absence of fraud, etc., recover in damages the appreciated value of the property taken, because he may recover the property in specie if a return can be had, and then adds: "The moment it, the coal, was severed from the freehold, a right of action then existed in favor of appellant. If he could maintain replevin, and recover the coal severed from the land, and upon this there can be no doubt, upon the same principle, in an action of trespass, he has the right to recover the value of the coal after it was dug in the bank."

In the *McLean County Coal Company v. John Long*, 81 Ill. 359, an action of trover for the conversion of coals taken from the land of plaintiff, the controversy was as to the proper measures of damages. The court followed *Robertson v. Jones*, *supra*, holding that the rule was the same in

Opinion of the Court—Leonard, J.

trover as trespass. Then, as the rule in trover is different here, so it may differ in trespass. Let us now turn to some of the cases wherein the rule contended for by appellant has been adopted. *Wood v. Morewood*, was tried at the Derby assizes in 1841, before Parke, B. The declaration contained a count in trover for coals taken, and another for damages for injury to plaintiff's reversionary interest in the land. The baron presiding, who had participated in the decision in *Martin v. Porter*, instructed the jury, "that if there was fraud or negligence on the part of defendant they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*, but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal fields had been purchased from the plaintiff." The latter rule was adopted by the jury, and the decision was acquiesced in.

Hilton v. Woods, vol. 4 Law Rep. Eq. Cas. 438, was decided by the vice-chancellor in 1867. He preferred the rule of *Wood v. Morewood*, to that of *Martin v. Porter*, and followed the former.

Although from the printed reports it appears that the two cases last mentioned were similar; yet, on the other hand, it seems improbable that Baron Parke, in the latter, would have disregarded the rule established by the former, in which he participated, if in that case there was no fraud or culpable negligence.

Barnsley Canal Navigation Company v. Twibill, vol. 3, English Railway Cases, 356, is of interest in this connection. Under the canal act, a canal company purchased the land over which the canal passed, but the coal mines and coal were reserved to the owners, who were to be at liberty to work the mines so as not to injure the canal. A., the owner of the land over which the canal passed, sold it to the company, and afterwards leased the coal up to the side of the canal on one side, and up to the towing-path on the other, to B. A. subsequently contracted with the com-

pany for the sale to them of the coal under the canal and towing-path, and eight yards on each side, which they required for the safety of their canal. It was decided by the court, "that B. was entitled to compensation in respect of the interest in the coal which he had acquired under the lease, viz., the profit to be derived from the coal when gotten, after deducting the expense of getting." (See, also, *Mayne on Law of Dam.*, 227, 228; *Chipman v. Hibberd*, 6 Cal. 162.)

Stockbridge Iron Company v. Cone Iron Company, 102 Mass. 86, was an action of tort praying for relief for injury to plaintiff's land by digging a shaft on adjoining land occupied by defendants, and thence digging into and under plaintiff's land and taking therefrom large quantities of iron and other ores. Plaintiff also prayed for an injunction. The court held that it was entitled to recover "the value of the ore, to be estimated as it lay in the bed, and not as it was after the defendants had increased its value by removing it."

In *United States v. Magoon*, 3 McLean, 171, the court instructed the jury "that the value of the ore after its separation from the mine was not the measure of damages, but the injury done to the soil; that the digging and carrying away by the same person is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil."

Mr. Sedgwick, in discussing this question (p. 273), says: "The principle to be extracted from these cases is, that in trespass, if the defendant has in good faith increased the value of the property, the plaintiff shall not have the benefit of his labor; and this appears to be the rule in this country." (See *Weymouth v. C. & N. W. R. Co.*, 17 Wis. 551; *Single v. Schneider*, 24 Id. 300; *Id.*, 30 Id. 570; *Winchester v. Craig*, 33 Mich. 207; *Folsom v. Apple River Log-driving Co.*, 41 Wis. 608.

Forsyth v. Wells, 41 Pa. St., was an action of trover for coal mined upon and carried away from the land by mistake. Plaintiff claimed, as in this case, that because the action was allowed for the coal as personal property, by necessary logical sequence, she was entitled to the value as

Opinion of the Court—Leonard, J.

it lay in the pit after it had been mined. The court say: "It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of the conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we cannot do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still, the fact that the form is for the sake of the principles, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. * * * When the taking and conversion are one act, or one continued series of acts, trespass is the most obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. * * * But when the law does not allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of action, to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much."

The court then states that in an action of trespass it prefers the rule adopted in *Wood v. Morewood* to that of *Martin v. Porter*, for the reason that the former gives just compensation for actual damage, while the latter does not, and adds: "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies, and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value in place and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits." (7 Casey, 456.)

Herdic v. Young, 55 Pa. St. 177, was replevin for logs cut by defendant by mistake on plaintiff's land. The logs were driven to the boom by defendant and there replevied. The court say: * * * * "As remarked by Lowrie, C. J., in *Morrison v. Robinson*, 7 Casey, 458, our natural sense of justice furnishes the ground and measure of compensation for injuries done by one man to the property of another, and demands adequate remedy to obtain it. In trespass for mesne profits, compensation was therefore held to be the measure of damage, and the defendant will be allowed for the value of permanent improvements erected by one whose title he has bought. * * * * Such compensation merely would have been the standard in this case had ejectment or trespass *quare clausum fregit* been brought instead of replevin. The value of timber on the ground would have measured the mesne profits. Upon principle and analogy, it is unjust to give to the plaintiff the advantage of the labor and expense of the defendant's cutting and hauling the logs and driving them to the boom. Yet, if we confine our view to the condition of the property at the time of the replevy, instead of going back to the time of the taking, this would be the mere effect of a change in the form of action, and not of an alteration of the circumstances. * * * In case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this (the true standard of damages) would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, hauling and driving to the boom." (See, also, *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 222, and *Coleman's Appeal*, Id. 278.)

A careful examination of the authorities has convinced us that there is a growing inclination among all courts, where it can be done, to apply the only safe and just rule in actions for damages, whether *ex contractu* or *ex delicto*, and that is, to give the injured party as near compensation as the imperfections of human tribunals will permit. This is the aim, the ideal, of the law, and it is the duty of courts to come as near it as possible in practice; and although courts differ as to the method of ascertaining the actual loss,

Argument for Appellant.

as well as to what constitutes actual loss, still there is a refreshing unanimity of opinion that such loss only, when ascertained, ought to be compensated in the absence of fraud, malice or culpable negligence.

We are satisfied that the weight of authorities sustains the views of counsel for appellant upon this important question, and that they are sanctioned by every sense of reason and justice. The court erred in refusing to allow defendant to prove the necessary cost of mining the ore in question, and for this error the judgment is reversed.

[No. 838.]

**ROBERT FERGUSON, APPELLANT, v. THE VIRGINIA
AND TRUCKEE RAILROAD COMPANY, RESPONDENT.**

PRIVATE WAY—ACTION FOR DAMAGES SUFFICIENCY OF COMPLAINT.—A complaint charging a railroad company with negligence in failing to keep in repair a private way, over its railroad track, constructed for its own use and benefit, and used by other persons by the mere license of the railroad company, does not state facts sufficient to constitute a cause of action.

IDEM.—In actions of this character to enable a plaintiff to maintain his action he must allege and prove some act of *misfeasance* on the part of the railroad company.

IDEM—PUBLIC HIGHWAY—DUTY OF RAILROAD COMPANY.—The railroad company could only be held responsible for the injuries plaintiff received upon the theory that the street where the accident occurred was a public highway prior to the construction of the railroad. In such event it would be the duty of the railroad company to keep it in repair.

PLEADINGS CONSTRUED LIBERALLY.—The rule of construing pleadings most strongly against the pleader has been changed by the statute of this state which provides that, for the purpose of determining its effect, a pleading shall be liberally construed. 1 Comp. Laws, sec. 1133.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Lindsay & Dickson, for Appellant.

I. The complaint in this case alleges facts sufficient to constitute a cause of action; as a motion for nonsuit should

Argument for Appellant.

be denied when there is any evidence tending to prove the issue on the part of plaintiff. (9 Wall. 197; 38 N. Y. 435; 17 Wall. 657; and cases cited.) A complaint in a case of this kind, which invokes solely the question, whether or not the defendant is guilty of negligence in the premises, should not be held obnoxious to a general demurrer.

II. The matters alleged in the complaint establish more than a mere license; something beyond a mere passive acquiescence, on the part of the defendant, in such use of the way in question, that by fitting and preparing this, as a proper way, for the passage of teams and consenting to the constant use of it, in that manner, by all persons desiring so to use it, the defendant impliedly invited such use. It was thereby held out by defendant to all persons, having occasion to pass that way, as a fit and proper way for the passage of their teams, and is, therefore, brought clearly within that line of decisions which hold that, where one has either, expressly or impliedly, invited others to come upon his premises, or by some preparation or adaptation of the place for use of customers or passengers, such as would naturally and reasonably lead them to suppose that they might properly and safely enter thereon, thereby inducing or alluring them to come upon his premises, that he is charged with the duty of seeing to it that, the way or premises are in a reasonably fit condition to enable the person so induced, to enter and pass with safety; and that for any omission or neglect therein, on the part of the person holding out this inducement, or implied invitation, resulting in injury, to one so allured or induced, he, the proprietor, must respond in damages. (*Sweeny v. Old Colony R.*, 10 Allen, 368; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Hounsell v. Smyth*, 7 C. B. (N. S.) 738; *Elliott v. Pray et al.*, 10 Allen, 378; *Straub v. Soderer*, 53 Mo. 38.)

But if the facts alleged show nothing beyond a simple permission, a mere passive acquiescence on the part of the defendant, it is liable. Negligence may be positive or negative; may result from omission or commission. (Shearman & Redfield on Neg., sec. 499; *R. Co. v. Stout*, 17 Wall. 657; *Birge v. Gardiner*, 19 Conn. 506; *Daley v. Norwich R. Co.*, 26 Conn. 591.

Argument for Respondents.

Whitman & Wood, for Respondents.

I. To avoid the objection that the complaint is uncertain and unintelligible, it must be easy of comprehension, and free from reasonable doubt. (*Salmon v. Wilson*, 41 Cal. 595.) The rule suggested by counsel for appellant to test the sufficiency of a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is ingenious but fallacious. (*Gantret v. Egerton*, Law Rep. vol. 2, 374.) The averments in the complaint as to the duty of defendant, are bad pleading. (*Seymour v. Maddox*, 71 E. C. L. 330.)

II. The facts stated show that the way was a private way, allowed to persons having occasion to use the same with teams or wagons. If so, it was the business of those using to keep it in repair. (Washburne's Easements and Servitudes, pp. 266, 683; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Doane v. Badger*, 12 Mass. 68; *Prescott v. White*, 21 Pick. 342; *Shearman & Redfield on Negligence*, sec. 355.) If a public way, the duty devolved elsewhere, that is, upon the public representatives, as a general rule. (*Shearman & Redfield on Negligence*, sec. 356; *Pollard v. Woburn*, 104 Mass. 84); but as to the city of Virginia, nowhere; three being no legal obligation to repair streets resting upon it. (*McDonough v. Mayor and Aldermen of Virginia City*, 6 Nev. 90.)

III. The facts fail to show that plaintiff had any occasion to be riding over the way. They fail to show that the accident was not caused, directly or indirectly, by the driver with whom he was riding, or that defendant knew, or that plaintiff did not know, the defect in the way, in either of which events defendant would be freed from liability, though charged with the duty of repairing the way. (*Achtenhagen v. City of Watertown*, 18 Wis. 331; *Fox v. Glastenbury*, 29 Conn. 204; *Horbon v. Ipswich*, 12 Cush. 488; *Talmadge v. Zanesville &c. R. Co.*, 11 Ohio, 197; *Smith v. Smith*, 2 Pick. 621.) None of the facts stated in the complaint bring this case within the category of actionable negligence. (*Gautret v. Egerton*, Law Rep. Com. Pleas Cases,

Opinion of the Court—Beatty, J.

vol. 2, 271; *Southcote v. Stanley*, 1 Hurlstone & Norman Exch. 246; *Bolch v. Smith*, 7 Id. 736; *Nicholson v. Erie R. R. Co.*, 41 N. Y. 525; *Hounsell v. Smyth*, 97 E. C. L. 740.)

By the Court, BEATTY, J.:

This is an action for damages for injuries alleged to have been sustained by the appellant in consequence of the failure of the defendant to keep in repair a certain wagon road in the city of Virginia. A demurrer to the complaint was sustained by the district court, and the plaintiff declining to amend, the defendant had judgment, from which the plaintiff appeals. The only question in the case is, whether the district court erred in sustaining the demurrer.

Two causes of demurrer are assigned: "First, that said complaint is uncertain and unintelligible in this, that it fails to show with any clearness or certainty any omission of duty or commission of wrong on the part of defendant tending to plaintiff's damage. Second, that said complaint does not state facts sufficient to constitute a cause of action."

The second of these objections alone will be considered. If, as counsel for respondent contend, the complaint wholly fails to show any omission of duty or commission of wrong by the defendant, the defect is reached by the second objection; but if the complaint is merely ambiguous or uncertain in the statement of an omission of duty or commission of wrong by the defendant, the objection on that ground is too vague and general to be regarded. It should have specified distinctly in what the uncertainty or ambiguity or want of clearness consisted. This it wholly fails to do, and ought not, therefore, to be considered. (C. L. 1104.)

Does the complaint disclose a cause of action? It shows that the defendant is the owner of a railway having its *termini* in the city of Virginia and the town of Reno. "That in the said city of Virginia, between Washington and Flowery streets, the main track of said railroad runs in upon and along a certain wagon way, road or thoroughfare for a distance of, to wit: sixty feet, and the said defendant did, at the time of the commission of the grievances hereinafter complained of, and now does, claim to own, and then was,

Opinion of the Court—Beatty, J.

and now is, in the possession of the land and premises lying west of and immediately adjoining said portion of said main track. That said portion of said main track which does so run in upon and along said wagon way," etc., "has at all times, since its construction, hitherto been covered with planking by said defendant, for the purpose of enabling the teams and wagons of those having occasion so to do, to pass over, upon and along said portion of said main track, and that said planking extends, to wit: two feet west of the west rail of said portion of said main track, and that heretofore, to wit: ever since the construction of said main track, hitherto all persons having occasion so to do have been accustomed, with the knowledge and consent of the defendant, to pass with teams and wagons over, upon and along said wagon way, road or thoroughfare, and in so passing did, with the knowledge and consent of the defendant, pass with their teams and wagons along said portion of said main track, partially on said main track and partially on the said land so claimed and possessed by defendant, as aforesaid, to wit: the land adjacent to said portion of said main track on the west; and the said defendant, ever since the construction of said main track, has kept and maintained the way so used for the passage of teams and wagons, including the said lands so used as a wagon way for all persons having occasion so to use the same."

It is further alleged that it was the duty of the defendant to keep said planking in repair so as to afford a safe means of passage for teams and wagons, and the breach of duty with which the defendant is charged is that it "did not use due and proper care to keep and maintain said portion of said main track and the land immediately adjacent thereto on the west, and used as a wagon way as aforesaid in a safe, secure and proper condition, so as to enable teams and wagons to pass upon and along the same as aforesaid, but wholly neglected so to do, and so neglecting its duty did heretofore, to wit, on the fifth day of November, A. D. 1875, carelessly and negligently suffer and allow the said portion of said main track and the land immediately adjacent thereto on the west, and used as a wagon way as aforesaid, to

Opinion of the Court—Beatty, J.

fall into decay, and to be and become on the said last mentioned day in an unsafe and improper condition for teams and wagons to pass over and upon the same." In consequence of which it is alleged, the plaintiff while rightfully passing with a loaded wagon partly on the track and partly upon the planking west of the track was thrown off, and injured, and damaged by reason of one of the wheels of his wagon, without any fault or negligence on his part, falling into a hole in the planking west of the track.

This is the substance of the complaint. The passage above quoted, which charges a breach of duty, is clear and unambiguous. The defendant is charged with a failure to repair the planking west of the track, suffering it, by use and the action of natural causes, to fall into decay and thus become unsafe. This is the charge and the whole charge, one of *non-feasance* merely, and not of any *misfeasance*, and the question before us is thus narrowed down to the inquiry whether the facts alleged in regard to the construction and use of the way are sufficient to charge the defendant with the duty, as regards the plaintiff, of keeping the strip of planking west of the track in repair.

The general allegation that it was the duty of defendant to repair, asserts a conclusion of law merely, and the demurrer ought to have been sustained unless the facts alleged support the conclusion. (*Seymour v. Maddox*, 71 E. C. L., 330; *Gautrel v. Egerton*, Law Rep. 2 C. P. 371.) Do the facts alleged show that the defendant owed the plaintiff the duty of doing what it is charged with having omitted to do? Under the old rule of construing a pleading most strongly against the pleader it certainly does not. It does not clearly appear that the wagon-way in question is a highway, nor that it existed before the railway was laid down, and both these facts are, in our view, essential in this case. The plaintiff, it is true, contends that even if the complaint should be held to mean that the road was the property of the defendant, constructed for its own purposes, and used by others by the mere license of defendant, that still enough is alleged to show a good cause of action. But to this we cannot assent. If the road belonged to the defendant it is

Opinion of the Court—Beatty, J.

not liable to the plaintiff for a failure to repair unless the road was provided as a means of access or passage for those having business with defendant, and the plaintiff was using it on such business. (*Indemaur v. Dames*, Law Rep., 2 C. P. 311; *Carlton v. Franconia Co.*, 99 Mass. 216, and cases cited.) If the plaintiff was using it on business of his own, by the mere license of the defendant, he took it with all its imperfections. In such case it would be necessary to allege and prove some act of *misfeasance* on the part of the defendant, such as placing a dangerous obstruction on the road at night, or undermining or weakening the way (*Corby v. Hill*, 93 E. C. L. 556), or at least that the defendant, with the knowledge of the evidence of some latent defect in the way, had failed to give warning under such circumstances as to indicate malice. (*Gautrot v. Egerton*, *supra*.)

This complaint fails to show that the plaintiff was using the road on business of, or with the defendant, or that it was guilty of any act of misfeasance or fraudulent concealment. Neither do the facts alleged bring the case within the principle decided in *Sweeney v. Old Colony Road*, 10 Allen, 368. There it was held that the defendant had invited, allowed and induced the plaintiff and others to cross its track at a certain point by constructing a thoroughfare and stationing a flagman to warn all persons of the approach of trains. The flagman motioned to the plaintiff to cross when a train was approaching, when—as was assumed for the purposes of the decision—he knew, and the plaintiff did not know, that it was dangerous to cross. A new trial was afterwards granted upon the ground that the evidence did not establish the facts assumed. This, however, does not detract from the authority of the decision, and its correctness is conceded. It stands upon the same principle as some of the cases above referred to. The act of the flagman in signaling the plaintiff to cross when he knew or ought to have known that it was dangerous, was a misfeasance for which his employer was held responsible. There is nothing in the case to countenance the notion that the mere construction of a road, adapting it to the purposes of

Opinion of the Court—Beatty, J.

transit, renders the owner liable for a failure to repair to every person who is permitted, without remonstrance, to use it. The case of *Robbins v. Jones*, 109 E. C. L. 221, is distinctly to the contrary.

Our conclusion is, that on the assumption that the road here in question was the property of the defendant, the complaint fails to state a cause of action. But the rule of construing pleadings most strongly against the pleader has been replaced in this state by the more liberal rule prescribed in section 70 of the Practice Act (C. L. 1133.) This section is the same as section 159 of the New York Code. The result of the decisions in that state seems to be that on a general demurrer the allegations of a complaint will be construed as liberally in favor of the pleader as, before the code, they would have been construed after a verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action or the defense. (Moak's Van Santvoord's Pl., 3d ed., side page 771 *et seq.* and cases cited.) In this state a similar doctrine has been declared in *State v. Central Pacific Co.*, 7 Nev. 103.

Applying this rule of construction to the allegations of this complaint, it may be held to mean that the way in question was the private way of some person other than the defendant, or that it was a highway.

If it was a private way of some person other than the defendant, the defendant may or may not have been obliged to keep the crossing in repair, according to circumstances. If it was obliged to keep it in repair for the owner, probably it would be liable for a failure to repair, not only to the owner, but to any person using it on business with the owner, or on business of his own with the owner's permission. But there is nothing in the complaint to show that it was the defendant's duty to repair the crossing if it was a private way, and nothing to show that the plaintiff was one of those who had a right to claim the fulfillment of such duty if it existed.

If it was a highway in use by the public before the railway was laid down, then it was the duty of the defendant, as to all the world, to restore and preserve that part of the

Opinion of the Court—Beatty, J.

road occupied by it in such condition as to afford a safe and convenient passage for wagons and teams. Having planked the track, the defendant would have been bound to exercise ordinary care in keeping the planking safe. This obligation exists probably independently of any statute, but if not, it is clearly imposed by the statute of this state. (C. L., sec. 3442.) It may or may not have been necessary, in order to make a safe crossing, to extend the planking upon the land of the defendant west of the track; but whether it was or not, the defendant was bound to keep it in repair to its full width. The persons who had occasion to pass over it could not be expected to know exactly what portion of the planking covered the original roadway and what portion extended beyond it. The whole of it was held out to the public as a part of the crossing which it was the defendant's duty to furnish, and it was liable for a defect existing in any part through its fault or negligence. The principle upon which such liability would rest is the ground of the decision in *Elliott v. Pray*, 10 Allen, 378; *Carlton v. Franconia Co.*, 99 Mass. 216.

Upon these grounds we conclude that if the allegations of the complaint are construed to mean that the road upon which this accident happened was a highway, in use as such before the construction of the railway (and under the rule above adverted to they may be so construed), then, and then only, do they show a good cause of action. But it has not been contended by counsel here, and we suppose was not contended in the district court, that the complaint means, or was intended to mean, anything of the kind. On the contrary, the only ground upon which it is contended that the defendant is liable, is, that having made a road and allowed everybody to use it, it has thereby become liable to any person injured by a defect in the road for a mere failure to repair. This position we consider wholly untenable, and although the complaint might be so construed as to show a cause of action, no such construction having been contended for, we do not consider it any reason for reversing the judgment of the district court.

The judgment is affirmed.

Opinion of Beatty, J., on response to petition for rehearing.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J.

In a former opinion we held that the complaint in this case failed to state a cause of action, unless it should be construed to mean that defendant laid its track upon a highway. That it might be so construed, under the code, was conceded; but having been led to believe that the plaintiff relied upon other and inconsistent facts to sustain his action, we concluded that a reversal of the judgment would be of no advantage, and accordingly affirmed it. A rehearing was afterward granted upon a petition showing that the plaintiff expected to be able to prove a highway. On the argument counsel for appellant again urged the proposition made in the original brief, and contended that under the allegations of the complaint he could prove a state of facts that would render the defendant liable for a failure to repair the way in question, even though it was its own private way.

We are satisfied, however, that in this position the authorities do not sustain him, and we refer again to the cases cited in our former opinion. In all the cases cited in opposition to our views as therein expressed, the principle upon which the defendants were held liable was that they had been guilty of some act of commission by which others were endangered. This is as true of that class of cases in which damages have been allowed for injuries to children caused by dangerous machines or instruments left in their way as it is of any of the other cases.

If a man leaves a machine which he knows to be dangerous where it is accessible to children, whose childish instincts will impel them to meddle with it he sets a dangerous trap for children and is justly held accountable for the injury that ensues. And so does a man set a dangerous trap who leaves car trucks standing near the crossing of a track without setting the brakes. But a man who permits others to use his private way is not bound at his peril to keep it in repair. He will be liable for the consequences if he places a dangerous and hidden obstruction in the way, and

Points decided.

on the same principle he may be liable if, with knowledge of the existence of some latent defect in the way, he fails to warn those who have been accustomed to use it, or who may be induced to do so by its having the appearance or reputation of being a highway. In such case, however, these material facts must be pleaded. They cannot be proved under an allegation of neglect to repair. The liability does not grow out of the failure to repair, but arises from the fraudulent concealment indicating malice. The case of *Knareborough v. The Beecher Company*, 3 Sawyer, C. C. R. 446, is not in conflict with this proposition, but, on the contrary, sustains it. In that case, knowledge of the defect on the part of the defendant was not essential to its liability, and that was all that was decided. All that was said, apart from the point decided, was to the effect that knowledge may be proved under a general allegation of negligence where it is merely an element of the negligence to be proved, but not where it is essential to defendant's liability, as it is here, on the assumption that plaintiff was injured while using the defendant's private way on business of his own.

There is no construction of this complaint which shows any cause of action against the defendant unless it is held to mean that the track was laid upon a highway. Allowing it that construction it does show a cause of action, and upon that ground alone the judgment of the district court is reversed, with directions to overrule the demurrer, with leave to the defendant to answer.

[Nos. 687-8.]

STATE OF NEVADA, APPELLANT, v. CONSOLIDATED
VIRGINIA MINING COMPANY, RESPONDENT; AND
STATE OF NEVADA, APPELLANT, v. CALIFORNIA
MINING COMPANY, RESPONDENT.

DEFAULT—EXCUSABLE NEGLIGENCE.—Two suits were brought against the Consolidated Virginia Mining Company, and two against the California Mining Company, for delinquencies and penalties for the non-payment of taxes. The complaint and summons in each case were served upon J.

Argument for Appellant.

G. Fair, the managing agent of each corporation. He delivered the same to the regularly retained attorney for both corporations, with the request that the papers should be properly attended to. The attorney appeared and filed a demurrer in one of the suits against the Consolidated Virginia Mining Company, and also in one of the suits against the California Mining Company. Defaults were regularly entered in each of the other suits. The attorney of the corporation makes an affidavit that he had never known or heard of but one suit against each corporation, and had no recollection of but one complaint and summons having been left with him; that while unable to state positively that but one complaint and summons was left, he avers unqualifiedly that if more than one was left he did not apprehend it at the time; and that if he had known that more than one was left he would have appeared and filed a demurrer in each suit, as the questions to be litigated were the same in each action: *Held*, that the failure of the attorney to appear in both actions was an honest mistake, without fraud or negligence on the part of the corporations, their superintendent, or attorney, and that the facts stated in the affidavits, presented on motion to set aside the defaults, made out a case of excusable neglect.

IDEM—AFFIDAVIT OF MERITS.—The attorney for defendants, in his affidavit, avers that he is familiar with all the facts upon which a recovery is sought in said actions; that he believes, and has so stated to defendants, that the defendants have a good and meritorious defense to each of said actions; that the subject-matter of said actions is *res adjudicata*, etc.: *Held*, sufficient.

IDEM—ENTITLING AFFIDAVITS.—The affidavits used on motion to set aside default, were simply entitled "State of Nevada, Storey County:" *Held*, that inasmuch as the affidavits intelligibly referred to the respective actions, the fact that they were not properly entitled therein was immaterial.

OBJECTIONS—WHEN MUST BE MADE IN THE COURT BELOW.—Technical objections to the introduction of papers or to the form of an order, which could readily have been cured if taken in the court below, will not be considered for the first time in the appellate court.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Frank V. Drake, District Attorney of Storey County, for Appellant.

I. The affidavits used in support of the motion were not entitled in any cause, nor in any court; nor did they intelligibly refer to any cause pending or determined in any court; nor did they set out any facts from which the court

Argument for Appellant.

could infer that a default had been entered in any specific cause or court. (*Pike v. Powers*, 1 How. Pr. 53; *Higham v. Hayes*, 2 Id. 27; *Whipple v. Williams*, 1 Mich. 115; *Arnold v. Nye*, 11 Id. 456; *Saunders v. Erwin*, 3 Miss. 732; *Humphrey v. Cande*, 2 Cowen, 509.)

II. The order was made without the condition precedent required by the statute. The right to the order is a statutory privilege, and can be obtained only by following the terms of the statute. (Sec. 1131 Comp. Laws Nev. (sec. 68, Pr. Act); *Pugsley v. Van Allen*, 8 Johns. 351; *People v. O'Connell*, 23 Cal. 281.)

III. The affidavits are wholly insufficient to meet the requirements of the statute. (Freeman on Judgments, sec. 112, and cases there cited; 3 Wait's Pr. 667-670, and cases cited; *Mulholland v. Heyneman*, 19 Cal. 605; *Coleman v. Rankin*, 37 Id. 247; *Hancock v. Pico*, 40 Id. 153; *Reiley v. Ruddock*, 41 Id. 312; *Chase v. Swain*, 9 Id. 130; *Ekel v. Swift*, 47 Id. 620; *Ins. Co. v. Swineford*, 28 Wis. 263; *Green v. Goodlow*, 7 Mo. 25; *Weimer v. Morris*, 7 Id. 6; *Heisterhagen v. Garland*, 10 Id. 66; *Langdon v. Bullock*, 8 Ind. 341; *Harrison v. Kramer*, 3 Clarke (Iowa), 554; *Harper v. Mallory*, 4 Nev. 448.

IV. The record discloses a good and perfect service in each case against each company and against each mining claim, under sections 3155 and 3233, Compiled Laws. The publication in the newspaper constituted a complete personal service as to the defendant corporation, and the posting of the copies of those published notices on the mining claim created a good service against the realty.

V. The affidavits as to a statement of a defense on the merits, are wholly insufficient. (Freeman on Judgments, sec. 108; *Brownell v. Marsh*, 22 Wend. 636; *Lecompte v. Walsh*, 4 Mo. 557; *Briggs v. Briggs*, 3 Johns. 257; *Brittan v. Peabody*, 4 Hill, 61; *Hunt v. Wallis*, 6 Paige, 377; *Winship v. Jewett*, 1 Barb. Ch. 173; *Bailey v. Taaffe*, 29 Cal. 422; *Rich v. Hathaway*, 18 Ill. 548; *People v. Rains*, 23 Cal. 127; *Goldsberry v. Carter*, 28 Ind. 59.)

VI. Where a default is regular, defendant cannot be allowed to insist upon any grounds of defense which are technical, or dishonest, or which are in the nature of a

penalty or forfeiture, or which are not entitled to the favor of the court. (Freeman on Judgments, sec. 108; *King v. Merchants' Ex. Bank*, 2 Sand. 693; *Parker v. Grant*, 1 Johns. Ch. p. 630; *Hawes v. Hoyt*, 11 How. Pr. 455; *People v. Rains*, 23 Cal. 127.)

C. J. Hillyer, for Respondent.

The failure to plead was not the result of any negligence or inattention on the part of the defendants, their agent, or attorney, or of any failure on the part of either to do all that is usual and proper for prudent men to do under similar circumstances. The failure was the result of an accident, seemingly unavoidable by the exercise of ordinary and proper diligence, even at the present time inexplicable, and of such unusual character that it would be most unreasonable to apprehend its repetition. There is no subject-matter in reference to which appellate jurisdiction is exercised with so much deference to the opinion and action of the inferior court as that of relieving from defaults on the ground of accident, surprise, inadvertence, or excusable negligence. (*Howe v. Coldren*, 4 Nev. 171; *Harper v. Malony*, 4 Id. 447; and cases cited in dissenting opinion; *Conley v. Chedic*, 7 Id. 340; *Woodward v. Backus*, 20 Cal. 137; *Francis v. Cox*, 33 Id. 323; 41 Id. 20; 46 Id. 63; 14 Johns. 342; 5 How. Pr. 461; 9 Abb. Pr. 160; Wait's Pr. vol. 3, p. 665.) *Res judicata* is a meritorious defense. (10 Abb. Pr. 64.)

By the Court, HAWLEY, C. J.:

These cases, presenting precisely the same questions, were argued, and will be decided together.

The records show that on the twenty-fifth of June, 1877, the plaintiff, the State of Nevada, brought four suits, two against the defendant, the Consolidated Virginia mining company, and two against the defendant, the California mining company, for the recovery of certain alleged delinquencies and penalties claimed to be due on account of delinquent taxes for two quarter years. The complaint and summons in each suit were regularly served upon J. G.

Opinion of the Court—Hawley, C. J.

Fair, the managing agent and superintendent of the defendants, by the sheriff of Storey county, on the twenty-ninth day of June, 1877.

The defendants appeared and filed a demurrer in one of the suits against the Consolidated Virginia mining company, and in one of the suits against the California mining company, and made default in each of the other suits. Judgment having been entered by default in these suits the defendants appeared, and moved the court to set the judgments aside, and to open the defaults. In support of these motions, the defendants presented the affidavits of J. G. Fair, the superintendent of defendants; C. J. Hillyer, the attorney for defendants, and A. H. Ricketts, a clerk in the office of said attorney. The court granted the motion, and the plaintiff appeals.

The affidavit of the superintendent shows that when he was served with the copies of complaints and summons he took them, according to his usual custom, to C. J. Hillyer, an attorney regularly employed on a salary to attend to the legal business of said defendants, and left them with said attorney after making the request that they should receive proper attention. He "remembers well there was more than one complaint, but whether or not there were more than two he does not remember; but he is confident he delivered to the attorney all the papers served upon him by the sheriff." After being assured by the attorney that the papers would be attended to he left the attorney's office, and shortly thereafter wrote to the president and board of trustees of the respective companies in San Francisco, California, that suits had been commenced for the recovery of penalties for the non-payment of taxes, and that the papers had been placed in the hands of their attorney, with instructions to defend the same. He further says "that he is informed by his attorney, who is familiar with all the facts, and fully believes that each of said companies has a good and meritorious defense to the certain cause of action in the respective suits in which a default has been entered."

The affidavit of C. J. Hillyer affirms the statements made by the superintendent in respect to his connection with the

suits. He states that until Sunday, the tenth day of September, 1877 (after the judgments by default had been entered), he had never known or heard of more than one suit against each of said companies for the collection of penalties exclusively, to wit, the two suits in which demurrers were filed; that a copy of the complaint and summons in one suit against the Consolidated Virginia Mining Co. to recover thirteen thousand four hundred and twenty-one dollars and twenty-five cents, and one suit commenced against the California Mining Co. to recover fifteen thousand seven hundred and three dollars and thirty cents, were brought to him by the superintendent of the defendants on the twenty-ninth day of June, 1877; that about the eighth day of July, being about to go to San Francisco, he made a draft of a demurrer to each of said complaints, and gave the same to his clerk, with instructions to make two copies in each case, and file one with the clerk and serve the other on the district attorney (which the affidavit of the clerk shows was done); that he has no recollection of ever having seen or had in his possession either of the complaints or any other papers in either of the suits in which defaults were entered; "that while, from the nature of the case, he cannot affirm positively that no such papers were ever shown him, he can state unqualifiedly that if so he did not apprehend it at the time, and that he never had a suspicion that those suits had been commenced until he learned it by telegram of Saturday last from Mr. Fair. In corroboration of the belief that such papers were not in his possession, affiant states that neither himself nor any other person, to his knowledge, has ever had any occasion to remove from his office any papers connected with these tax suits, and that immediately after learning of the judgments by default, affiant made a thorough search through all the papers in his office, and that none connected with any suits for penalties, except the two in which demurrers had been filed, were found."

"Affiant further says that had he known of the commencement of the said suits he would have filed therein at the proper time demurrers in the same form as those actually

filed in the other two suits, commenced on the same day, the questions to be litigated in each case being substantially the same.”

“Affiant further says that he is familiar with all the facts upon which a recovery is sought in said action, and fully believes, and has so stated to the defendants, that the defendants have a good and meritorious defense to each of said actions, and are not in fact liable for any portion of the amount therein claimed, and also that the subject-matter of said action is *res adjudicata*, and that this, in the opinion of affiant, sufficiently appears on the face of the complaints, but if not, that it can be made fully to appear by answer.”

“Affiant further says that there is not, and has not been, any desire on the part of defendants to delay a hearing in said action upon the merits.”

A. H. Ricketts deposes and says, after confirming the statements of Mr. Hillyer as to the instructions about the preparation and filing of the demurrers in the two suits, and the performance of that duty upon his part pursuant to said instructions, “that neither from Mr. Hillyer, nor from any other source did he learn, or have any reason to suspect that any more than two actions were then pending for taxes against said companies in which pleadings had not been filed; that he first learned that four actions, instead of two, had been commenced in the month of June, after judgment by default had been entered in two of said causes on the seventh instant; that on learning this and being satisfied that there had been some mistake, and thinking it possible that Mr. Hillyer might either have overlooked the papers or have neglected to give instructions in relation to them he, in the absence of Mr. Hillyer, who was in San Francisco, examined thoroughly the legal papers in his office and found there two copies of complaints filed June twenty-fifth, with summons attached, and no papers whatever in relation to any other suits for tax penalties, and affiant is confident no such papers were in the office. The copies of complaints found were both for the recovery of penalties for non-payment of tax for the quarter ending December 31, 1876.”

Opinion of the Court—Hawley, C. J.

We think these affidavits presented sufficient facts to authorize the court to set aside the judgment obtained by default, and to open the defaults and allow defendants to appear and interpose any defense they might have.

It is very true, as was argued by appellant's counsel, that there is no satisfactory proof as to what became of the two missing complaints and summons. The return and affidavit of the sheriff is positive that he did personally serve the superintendent with four copies, one in each suit, on the twenty-ninth day of June, 1877. It was the duty of the superintendent to deliver these copies to the attorney for the defendants, and he is confident that he did so deliver *all* the papers that were served upon him. If so, there was no fault or negligence on his part. The attorney seems to have acted in good faith. It may have been an oversight on his part in not immediately examining all the papers brought by Mr. Fair, instead of simply examining "one of the complaints for the purpose of seeing the general nature of the suit," but certainly it was not such an act of negligence in omitting to do so, at that time, as would authorize the court to refuse to open up the default upon this ground merely. The defendants, notwithstanding the fact of a perfect service having been made by publication, in addition to the personal service upon the superintendent, had the right to believe, from the letter of their superintendent, that their attorney would file the necessary papers in all the suits. But without noticing all the points urged by the district attorney in his brief, we are of opinion that the fact that the defendants appeared in two of the cases shows conclusively that their attorney was ignorant of the existence of the other two suits, and that it was owing to an honest mistake which occurred in some unexplained manner, without any positive fault or negligence upon his part, or upon the part of the defendants or any of their agents, that demurrers were not filed in all the suits. There is no reason why demurrers should have been interposed in the two cases and not in the others. The suits were identical in character, and if any defense could be made in one it could in all. The facts here, although of an entirely different nature, are

Opinion of the Court—Hawley, C. J.

as strong in favor of setting aside the judgment and opening the default as in *Howe v. Coldren*, 4 Nev. 171, and the decision in that case upon the facts was expressly concurred in by the court in *Harper v. Mallory*, Id. 447; but a majority of the members of the court dissented from some of the reasons given in *Howe v. Coldren*, upon the general subject of opening defaults.

It is difficult to establish a rule upon this subject that would be applicable to all cases, as every case must necessarily be determined upon its own peculiar facts. We think the facts in these cases, as presented in the affidavits referred to, bring the defendants within the rule of the statute which authorizes the court, "upon such terms as may be just, and upon payment of costs," to "relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" (1 Comp. Laws, 1131), and are of opinion that the action of the court below in opening the defaults should be sustained.

The affidavits as to the merits are, in our judgment, sufficient. (*Howe v. Coldren*, *supra*; *Woodward v. Backus*, 20 Cal. 137; *Francis v. Cox*, 33 Cal. 323.)

The affidavits were prepared to be used, and were used, in the two cases wherein the defaults had been entered. The fact that they were not properly entitled in these actions is immaterial, as they do intelligibly refer to the respective actions in which the defaults were entered. (1 Comp. Laws, 1568.) But if the objection of appellant possessed any merit, it should have been made in the court below, and not urged for the first time in the appellate court. (*Longabaugh v. V. and T. R. Co.*, 9 Nev. 292.)

The form of the order is also objected to by appellant. The court made the orders setting aside the defaults and opening the judgments, and added: "It is further ordered by the court that said defendants do pay the costs of this proceeding," instead of granting the relief, upon the payment of costs, in the language of the statute. This objection, like the last, might readily have been cured if taken in the court below at the time the order was made, and for

Points decided.

the reasons stated in *Longabaugh v. V. and T. R. Co., supra*, cannot be urged for the first time in the appellate court.

The orders appealed from are affirmed, and the district court will fix a reasonable time within which the respective defendants will be allowed, upon the payment of the costs in these proceedings in the court below, to plead to the respective complaints. Each party to pay its own costs on appeal.

[No. 853.]

STATE OF NEVADA, RESPONDENT, v. CALIFORNIA
MINING COMPANY ET AL., APPELLANTS.

RULE EIGHT—ARGUMENT OF COUNSEL.—The “argument” mentioned in rule eight of the supreme court refers to an oral argument before the court. Agreeing to waive argument, and taking time to file brief on the merits of the case is the same, in effect, as an oral argument.

TAX SUITS—CONTROL OF BY ATTORNEY-GENERAL—APPEARANCE OF OTHER ATTORNEYS.—The attorney-general has the entire control of all tax suits in the supreme court, on the part of the state. Other attorneys may appear by consent of the attorney-general, but not otherwise. If nothing to the contrary is shown, the court will always presume that an attorney appearing for the state in such suits is authorized by the attorney-general to act in the case.

UNDERTAKING ON APPEAL—SUFFICIENCY OF.—An undertaking which complies with section three hundred and forty-two of the civil practice act (1 Comp. Laws, 1403), for the stay of execution, with the exception of binding the sureties to pay in gold coin: *Held*, to be a sufficient undertaking on appeal, as required by section three hundred and forty-one (1 Comp. Laws, 1402), for the payment “of all damages and costs” awarded on appeal.

IDEM—EXECUTED ON SUNDAY.—An undertaking on appeal executed on Sunday is valid. The execution of such a bond is not “transacting judicial business,” and is not prohibited by the statute. (1 Comp. Laws, 4.)

TAX ON PROCEEDS OF MINES—COLLECTED QUARTERLY.—In construing section ten of the act providing for the taxation of the net proceeds of mines (2 Comp. Laws, 3254): *Held*, that there is nothing in said section to prevent the collection of such taxes quarterly. (*State v. Eureka Con. M. Co.*, 8 Nev. 16, affirmed.)

IDEM—TEN PER CENT. PENALTY.—In construing the various sections of the revenue law relating to the collection of delinquent taxes: *Held*, that the per centum penalty imposed by section twenty-four (2 Comp. Laws, 3148), does not apply to suits brought for the collection of delinquent taxes on the proceeds of mines, and that such percentage is not imposed

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Argument for Respondent.

or authorized by section one of the act prescribing an additional penalty for non-payment of taxes. (2 Comp. Laws, 3238.) (HAWLEY, C. J., dissenting.)

APPEAL from the District Court of the First Judicial District, Storey County.

F. V. Drake, Attorney-general of Storey county, for Respondent (on motion to dismiss appeal).

I. There is no undertaking on appeal as required by section 341 of the code. (*Bank v. Judson*, 10 How. Pr. 133; *Halsey v. Flint*, 15 Abb. Pr. 367, and note; *Onderdonk v. Emmons*, 17 How. Pr. 545; *Wilson v. Allen*, 3 How. Pr. 369; *Hoppock v. Cottrel*, 13 How. Pr. 461; *Gaudette v. Glissan*, 11 Nev. 184; 4 Wait's Pr. 224, 225, 226 *et seq.*; *Wilson v. Holman*, 2 O. R. 254; *Oliver v. Pray*, 4 Id. 191; *Langley v. Warner*, 1 N. Y. (1 Comstock), 606.) The undertaking fails to specify any kind of money or currency. (1 Comp. Laws, 1403.) Statutory enactments granting rights and means of appeal are strictly construed and enforced. (*Cañon Road Co. v. Lawrence*, 3 Or. 519; *Elliott v. Chapman*, 15 Cal. 383; *Shaw v. Randall*, 15 Id. 386; *Wilson v. Holman*, 2 O. R. 254; *Oliver v. Pray*, 4 Id. 191; *More v. Brown*, 10 Id. 198; *Bradley v. Sneath*, 6 Id. 491; *Harding v. Owings*, 1 Bibb, 214.) The undertaking was executed on a non-judicial day, and is therefore illegal. (Bouvier Dict. 767 (14th ed. 1873); *Field v. Park*, 20 Johns. (N. Y.) 140; Freeman on Judgments, sec. 138; *State v. Shuer*, 33 Maine, 539; *Chapman v. State*, 5 Blackford, 111; *Storey v. Elliott*, 8 Cowen, 27; *Williamson v. Roe*, 3 D. & L. 330.)

II. The district attorney is the only person to whom the management and control of this class of suits are entrusted. The court in the exercise of its discretion ought to relieve respondent from the effects of any stipulation not consented to by the district attorney. (*Quinn v. Lloyd*, 7 Robt. 538; *People v. Mayor*, 11 Abb. Pr. 66; *Coxe v. Nicholls*, 2 Yeates, 546; *Harrow v. Farrow*, 7 B. Mon. 126; *Banks v. Evans*, 18 Miss. 35; *Union Bank v. Govan*, 18 Miss. 333; *Kellogg v. Gilbert*, 10 Johns. 220; *Crary v. Turner*, 6 Johns. 51; *Simonton v. Barrell*, 21 Wend. 362; *White v. White*, 6 Nev. 20;

Argument for Appellant.

Williams v. Keller, 6 Nev. 141; *McWilliams v. Herschman*, 5 Nev. 265. The filing of an undertaking on appeal is necessary to confer jurisdiction. The agreement of parties cannot give the court jurisdiction: *Mygatt v. Ingham*, Wright, 176; *Bradley v. Sneath*, 6 Ohio, 491; *Bayless v. Belmont Bank*, 15 Ohio, 619; *Farrand v. Bentley*, 6 Mich. 281; *Farchild v. Daten*, 33 Cal. 286; *Phillips v. Welch*, 11 Nev. 187; *Stamps v. Newton*, 3 How. [Miss.] 34.)

C. J. Hillyer, for Appellant (on the merits).

By the act of 1871, the collection of taxes on the proceeds of the mines must be enforced in the same manner as the taxes upon other personal property. (Stat. of 1871, p. 90, sec. 10.) The judgment is erroneous in including the ten per cent. penalty in addition to the penalty of twenty-five per cent. In the original revenue act of 1864-5, and the amendments thereto, previous to 1871, the intention is apparent to provide a complete and distinct system of assessing and collecting the tax on the proceeds of the mines. (Comp. Laws, pp. 214 to 221.) In this portion of the act nothing is said of a penalty of ten per cent. The relative order of the several acts to be performed is substantially the same as in the previous portion of the law in respect to other property, and following this order a section in reference to this ten per cent. should have been inserted between sections 12 and 22. Its omission is evidently intentional. The law of 1871 is equally silent in relation to it. In fact, in all the statutes concerning revenue, this ten per cent. penalty is only mentioned or referred to in three places: first, in sec. 24 of the revenue act (Comp. Laws, 188); second, in sec. 30 of same act (Comp. Laws, 191); and third, in the act of 1873 (Comp. Laws, 222). The purpose of the act of 1873 was to impose a penalty of twenty-five per cent. and not this penalty of ten per cent. This is indicated by its title and shown by the language of the enactment. It does not impose or attempt to enforce the ten per cent. penalty. No intention is shown to impose a penalty of ten per cent., nor to recognize this penalty, except so far as theretofore imposed by the revenue laws. It imposes

Opinion of the Court—Leonard, J.

twenty-five per cent., and leaves the ten per cent. to stand as fixed by previous legislation.

Lewis & Deal, for Respondent.

The tax on the proceeds of mines is collectible every quarter. (*State v. Eureka Con. M. Co.*, 8 Nev. 15.) The ten per cent. penalty was properly added to the judgment. The intention of the legislature controls even against the express language. (*Rooney v. Buckland*, 4 Nev. 45.) The act of 1873, p. 169, clearly imposes it in all cases when suit is brought in the district court. That act certainly applies to all cases where suits are first brought in the district court, and the amount exceeds three hundred dollars. As this act is an independent one, not purporting to amend any particular law, it certainly cannot be said that its language does not embrace suits for the collection of mining taxes as well as any other. If the twenty-five per cent. penalty applies to the mining tax in all suits brought in the district court for taxes, then the ten per cent. is equally to be collected, for the same language which makes the twenty-five per cent. applicable to the mining tax, equally imposes the ten per cent. The clear meaning of the act is that in every suit for taxes, whether the tax be a mining tax or not, there shall be collected a penalty of twenty-five per cent. in addition to the ten per cent. provided by or mentioned in the then existing revenue laws.

By the Court, LEONARD, J.:

This action was commenced in the first judicial district court against the California mining company and the mining claim described in the complaint, to recover a state tax of thirty-three thousand six hundred twenty-four dollars and one cent.; a county tax of fourteen thousand nine hundred forty-four dollars and one cent.; a school tax of five thousand six hundred and four dollars, and a railroad bond tax of eighteen thousand six hundred and eighty dollars and one cent.; amounting in all to the sum of seventy-two thousand eight hundred and fifty-two dollars and three cents, in United States gold coin, alleged to be due from defendants

Opinion of the Court—Leonard, J.

to plaintiff, under the revenue laws of this state regulating taxation of the proceeds of mines containing precious metals, on account of twenty-nine thousand one hundred and twenty tons of gold and silver-bearing ores assessed at one hundred fifty-five dollars per ton, and extracted from the mine described in the complaint, during the quarter of the year commencing April 1, 1876, and ending June 30, 1876; also the additional sum of seven thousand two hundred and eighty-five dollars and twenty cents, the same being ten per centum of the said tax, alleged to be due as a penalty for non-payment of the tax as required by law; and the further sum of eighteen thousand two hundred and thirteen dollars, the same being an additional penalty of twenty-five per centum of said tax for non-payment of the tax as required by law, making in all the sum of ninety-eight thousand three hundred and fifty dollars and twenty-three cents, besides costs.

Defendants answered to the complaint and, among other things, denied that the tax mentioned in the complaint was delinquent or due at the time the action was commenced, and alleged that the action was prematurely brought. Defendants denied that the levy and assessment of the taxes were legally made; denied that at the commencement of the action, or at any other time, either of the defendants had become liable to pay as taxes the amount specified in the complaint or any other amount, or the sums claimed to be due as penalties or percentage, or any part of said sums.

Plaintiff, by its attorneys, demurred to the answer on the grounds: First, that none of the material allegations of the complaint were denied by the answer; second, that the new matter set up in the answer did not constitute a defense to plaintiff's cause of action, set out in its complaint, either in whole or part; third, that the defense set out in the affirmative matter in the answer constituted no defense to the recovery of the tax under the statute of this state—no such defense being allowed.

The demurrer was sustained, and defendants refusing to amend, judgment was rendered and entered against defendant, the California mining company, for ninety-eight thousand three hundred and fifteen dollars and twenty cents—

Opinion of the Court—Leonard, J.

the tax and penalties alleged in the complaint to be due; also for four thousand nine hundred and seventy-six dollars and ninety cents, the amount of costs taxed in the case, making in all the sum of one hundred and three thousand two hundred and ninety-two dollars and ten cents, in United States gold coin. Separate judgment for the same amounts was also rendered and entered against the mine described in the complaint. Defendants appeal from the judgments. The true amount of the tax and penalties claimed was ninety-eight thousand three hundred and fifty dollars and twenty cents, but their amount as stated in the judgments, and for which judgments were rendered, was only ninety-eight thousand three hundred and fifteen dollars and twenty cents. However, the error is in defendants' favor and they cannot complain.

The attorneys of record in the court below were the district attorney of Storey county and Messrs. Lewis & Deal for the state, and Messrs. C. J. Hillyer and R. S. Mesick for the defendants. Judgment was rendered March 15, 1877, and this appeal was taken March 26, 1877. On the first day of the July term of this court, the cause was set down for argument on the thirty-first day of July, 1877. On the twenty-first day of July, 1877, Messrs. C. J. Hillyer and Lewis & Deal, representing the respective parties, appeared in open court, and consented to dispense with oral argument, and to submit the case on briefs of counsel. It was thereupon ordered, that the case be so submitted; that counsel for appellants should have fifteen days in which to file brief, and counsel for respondent, ten days thereafter to reply.

On the twenty-fifth day of July, 1877, F. V. Drake, Esq., district attorney of Storey county, served upon counsel for appellants a notice "that on the thirty-first day of July, 1877, at ten o'clock A. M., and before the hearing of said appeal, the respondent, by its attorneys, would move the court to dismiss this appeal with costs, on the ground that the appellants had failed and neglected to file an undertaking on appeal in said cause, as by law required."

On the thirty-first day of July, 1877, at the time and

Opinion of the Court—Leonard, J.

place stated in the notice, the district attorney appeared in court and argued his motion to dismiss the appeal. The attorney-general has not at any time appeared in person in this court, nor has he, in person, taken part in any of the proceedings affecting this case. The consent to submit the case on its merits upon briefs to be filed, was given by Messrs. Lewis & Deal on one side, and C. J. Hillyer on the other; and the motion to dismiss the appeal was argued, and the written notice thereof signed, by the district attorney alone. At the argument of the motion to dismiss, neither of the attorneys for appellants was present in court, and no notice is taken of the motion in their brief. In accordance with the order of the court, Messrs. C. J. Hillyer, for appellants, and Lewis & Deal, for respondent, filed briefs upon the merits of the case. And although we intend to decide the motion to dismiss upon its merits, because of an apparent misunderstanding between counsel for respondent, still, it seems proper to consider it in the light of the facts, in connection with rule viii, of this court, which reads as follows:

“Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of errors assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed, at least one day before the argument, or they will be disregarded. In such cases, the objection must be presented to the court before the argument on its merits.”

The district attorney does not claim that it would be just to appellant to allow counsel for respondent to argue a case on its merits, and thus debar the former of the privilege of correcting the undertaking, and then permit the latter to move a dismissal of an appeal that had been treated as valid by him; nor, as we understand him, does he argue that such practice is permissible under the rule quoted. But he urges that the notice was given and the motion made before the argument on its merits. He claims that the argument was not had upon the merits until the briefs

were filed. If in this case the briefs constituted the entire argument referred to in the rule, it must follow that they are a part of the argument in every case, and consequently that the argument is never concluded until after the briefs are filed. Such is not the case. The "argument" stated in the rule is an oral argument before the court. But it is said by the district attorney that Messrs. Lewis & Deal had no power to submit the case as they did. It must be admitted, however, that they had as much power to do that as the district attorney had to move a dismissal of the appeal. The district attorney had charge of the case in the court below, but the moment it was appealed to this court, the attorney-general alone had control of it. (2 C. L. 2773 *et seq.*; *People v. Pacheco*, 29 Cal. 213.) After the appeal, the district attorney, like any other attorney, may appear in a case wherein the state is a party, and by his act bind the state, if he comes in aid and by consent of the attorney-general, but not otherwise. Courts always presume, if nothing to the contrary is shown, that counsel who appear are fully empowered to act in the case; but such presumption ceases if a showing is made by the proper party to the contrary. Nothing appearing to the contrary, we therefore conclude that the acts of Messrs. Lewis & Deal, as well as those of the district attorney, were performed by the consent of the attorney-general. If so, agreeing to waive argument before the court, and taking time to file briefs on the merits of the case, was the same in effect as an oral argument. The case was submitted at the time of the consent, and the motion to dismiss the appeal should have been made and noticed before that time. *Lynch v. Dunn*, 34 Cal. 518, is not opposed to the view we take. (See, also, *Bryan v. Berry*, 8 Cal. 134.) We think the motion to dismiss the appeal must be overruled, but will not rest our decision upon what has been said. We are urged by the district attorney, in an exhaustive and able brief, to grant his motion, on three grounds:

1. It is claimed that there is no undertaking on appeal, as required by sec. 1402, vol. I., C. L.; that the undertaking given was for the purpose of staying execution only, as required by sec. 1403.

Opinion of the Court—Leonard, J.

2. That the judgment appealed from being for gold coin, the undertaking must be drawn and payable in the same kind of money; that inasmuch as the undertaking in this case does not specify gold coin, it is void.

3. That the undertaking was executed on Sunday, a non-judicial day, and is therefore illegal as a contract or as a judicial proceeding.

We are not to inquire whether the undertaking is or is not sufficient to stay execution, but whether it is sufficient to perfect the appeal.

After entitling the cause, the undertaking recites the judgment appealed from, the amount of the judgment and costs, the judgment-debtor and creditor, the appeal to this court, and appellants' desire to stay execution and all proceedings pending the appeal. It gives the names, residence and occupation of the sureties, who bind themselves in the sum of two hundred and twenty thousand dollars, that if the said judgment appealed from, or any part thereof, be affirmed, the appellants shall pay to the plaintiff the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, *and also all damages and costs which may be awarded against the appellants upon the appeal, or that they will pay the same*, not exceeding the sum of two hundred and twenty thousand dollars. The undertaking was signed and sealed by the two sureties, and the affidavit required by statute taken, on Sunday before a notary public.

It will be observed that the undertaking complies with the requirements of section 1403, with the exception of binding the sureties, in terms, to pay in gold coin. It will also be noticed that section 1402 does not require an undertaking given to perfect the appeal to be made payable in gold coin; that in section 1402 the only requirement of the sureties is that they bind themselves "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars;" that by section 1403 the sureties are required, before a stay of execution can be had, to bind themselves in double the amount of the judgment, to pay

the amount directed to be paid by this court, "and all damages and costs which shall be awarded against the appellant upon the appeal."

It will be seen that the whole requirement of the first section mentioned is also required by the last; that is to say, in both, the sureties must bind themselves to pay all damages and costs, etc. Under the first section, if they so bind themselves, the appeal is perfected. How could it have strengthened the obligation to pay the damages and costs of appeal, if, in the same instrument, the sureties had bound themselves to pay them in the sum of three hundred dollars, and then, second, in the sum of two hundred and nineteen thousand seven hundred dollars, to pay the judgment of this court and all costs and damages? The undertaking is for something like fourteen thousand dollars, more than twice the amount of the judgment and costs, which strongly indicates that the intention of the sureties was, not only to stay execution, but also to perfect the appeal. But whether they unwittingly or intentionally executed the undertaking for the purpose of perfecting the appeal as well as staying execution, the result is, that they accomplished the first, whether they did the last or not. An appeal is taken by filing and serving notice. It is made effectual as an appeal simply, by executing an undertaking in accordance with section 1402. It is made effectual as an appeal, and a stay of execution is obtained, in case of a money judgment, by the execution of an undertaking required by section 1403, and permitted under section 1408. (See *Zoller v. McDonald*, 23 Cal. 136; *Dobbins v. Dollarhide*, 15 Id. 374; *Curtis v. Richards et al.*, 9 Id. 37; *Mokelumne Hill Co. v. Woodbury*, 10 Id. 185; *Dore v. Covey*, 13 Id. 505; *Mulford v. Estudillo*, 17 Id. 618; *Thompson v. Blanchard*, 3 Comst. 336; *Doolittle v. Dininny*, 31 N. Y. 350; *Seacord v. Morgan*, 17 How. Pr. 394; *Newton v. Harris*, 8 Barb. 309; *Hyde v. Patterson*, 1 Abb. Pr. 250; *McCarty v. Beach*, 10 Cal. 461.)

In support of the third ground of objection to the undertaking, it is said that it would have been void under the common law which has been adopted in this state, and that under the statute (C. L. section 3) the transaction of all

Opinion of the Court—Leonard, J.

judicial business, with certain exceptions not embraced in this case, is prohibited on Sunday; "that judicial business, in its broadest sense, includes all proceedings had in matters which give courts jurisdiction of a case and which are usual in the progress of a cause."

Under the common law no judicial act could be done on Sunday, but as to the making of contracts and the doing of all other acts not of a judicial nature, that law made no distinction between Sunday and a week day. (Vol. 2. Pars. Cont. 757, note (n); vol. 1, Story on Cont., sec. 754; *Strong v. Elliott*, 8 Cow. 30; *Kepner v. Keefer*, 6 Watts, 231; *Johnson v. Day*, 17 Pick. 106; *Bloom v. Richards*, 2 Ohio St. 387.)

Courts refused to sustain or enforce contracts admitted by all to secure an immoral end, or such as were based upon immoral considerations; but no court of last resort went so far as to include in that class such as were executed on Sunday, *because* they were made on that day. And since the statute (29 Car. 2) which enacts that "no tradesman, artificer, workman, colorer or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's day," it is evident that the English courts have considered contracts not prohibited by statute, neither *contra bonos mores* nor otherwise illegal because made on Sunday. (*Blossome v. Williams*, 3 B. & C. 113.) In Storey on Contracts, vol. 1, at sec. 754, it is said: "In all these cases, however, it must be understood that the act done must come fairly and reasonably within the terms of the statute forbidding it; for, as the common law did not render contracts void because made on Sunday, the case must be brought directly within the prohibition of the act." (See, also, vol. 2, Pars. Cont. 757.)

The prohibitions which our legislature has seen fit to make affecting this case are, that "no judicial business shall be transacted by the court, except deliberations of a jury, who have received a case on a week day, so called, and who may receive further instructions from the court, at their request, or deliver their verdict; nor any civil process be served by any certifying or attesting officer, nor any record made by any legally-appointed or elected officer,

upon the first day of the week, commonly called the Lord's day." (Vol. 1, sec. 4, C. L.)

In our opinion, the execution of the undertaking in question was neither "judicial business transacted by the court" nor judicial business in any proper sense. It is sometimes difficult to discriminate between judicial and ministerial acts, but there is little difficulty in this case. It is not claimed that it was "judicial business transacted by the court," but that it was judicial business because it appertained to court matters, and was an act necessary to be done in order to give jurisdiction to this court, and was a usual proceeding in such cases. If any portion of the acts performed in executing the undertaking was judicial business, the whole was. If the acts of signing and justifying were of that nature, then writing the undertaking was the same; for they were all requisite in the preparation and completion of the instrument. And yet it would hardly be claimed by the district attorney that a preparation of the undertaking by the notary on Sunday, so it could be executed and filed early Monday morning, would be a judicial act because it was in aid of a court proceeding.

How can the preparation and execution of an undertaking to perfect an appeal and stay execution be judicial business any more than the collecting of money to deposit in lieu of the undertaking? One appellant executes a bond on Sunday to be delivered and filed on Monday; another travels fifty miles to collect money to be deposited in place of an undertaking. The act of neither is against the law or in any manner invalid, unless what is so done on Sunday is judicial business. One accomplishes his object in one way, the other in another. Can it be possible that the first is judicial business while the other is not? We do not think the district attorney would prosecute either for violating the fourth section of the act entitled, "An Act for the better observance of the Lord's day," and yet, if his position is correct, they would both be liable to pay a fine of not less than thirty dollars, nor more than two hundred and fifty dollars, for transacting judicial business on Sunday. It is said by Chief Justice Field, in *Kelly v. Van Austin*, 17 Cal.

§65, that "the clerk in entering judgments upon default, acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only the agent by whom it is written out and placed among the records of the court." He cannot enter the default and judgment on Sunday, because by another portion of section 4, he is prohibited from making any record on that day, but he is not prohibited because it is judicial business. If entering a default and judgment is purely a ministerial act, for the reasons stated, it certainly must be true that even the filing of the undertaking by the clerk is such an act, because he is not authorized to exercise any judicial functions, his only duty being to file such an one as is presented, and "to place it among the records of the court." (See *Johnston v. People*, 31 Ill. 473; *Johnson v. Day*, 17 Pick. 109; *Hilton v. Houghton*, 35 Me. 144; *Goss v. Whitney*, 24 Vt. 187; *Lovejoy v. Whipple*, 18 Vt. 379; *Clough v. Shepherd*, 31 N. H. 494; *Fox v. Hills*, 1 Conn. 308; *People v. Bush*, 40 Cal. 346.)

The same reasoning and authorities apply to the acts of the notary. They were not prohibited because they were purely ministerial (*Betts v. Dimon*, 3 Conn. 108); nor was the notary required to make a record of the act of administering the oath to the sureties. (Sections 236–237–238, vol. 1, C. L.)

The motion to dismiss the appeal is denied.

Counsel for appellant claims that the judgment is erroneous for two reasons: First. It is urged that the action was prematurely brought; that by section 3254 C. L., the collection of taxes on the proceeds of mines must be enforced in the same manner as taxes upon other personal property; that no suit can be commenced for other delinquent taxes before the last day of November next succeeding the assessment of the property taxed; that section 3254 is a complete substitute for all previous provisions for the enforcement of the collection of taxes on the proceeds of mines; that the word "manner" in the section of the statute referred to, includes "time," and consequently that the tax upon the proceeds of mines cannot be collected

Opinion of the Court—Leonard, J.

quarterly. Second. That the court erred in rendering judgment for the ten per centum penalty, for the reason that the statute does not authorize it in actions for delinquent taxes upon the proceeds of mines.

The first objection was raised in *The State v. Eureka Consolidated Mining Company*, 8 Nev. 29, and there decided adversely to appellants' construction. We are satisfied with the opinion rendered in that case upon this question. The provisions of the statute requiring the collection of taxes in this class of cases to be enforced "in the same manner in which the tax on any other kind of personal property is enforced and collected," does not by any means necessarily suggest the conclusion that suits for their collection must be brought at the same time.

There are many sections in the statute which convince us that the legislature did not intend to have section 3254 convey the meaning given by counsel for appellants. The statute of 1871 itself requires the assessment to be made quarterly, and makes each assessment and tax separate and independent. It provides that the tax for each quarter shall be a lien upon the mine from which the proceeds taxed were taken, and that such lien shall attach on the first days of January, April, July and October of each year. If the legislature intended to have the tax collected annually instead of quarterly, no good reason can be given for the enactment of sections 3246 and 3250 of the act of 1871. Those sections are consistent and proper, however, if it was intended that there should be a quarterly collection. We do not think the statute of 1871 was intended to supersede or repeal former statutes in relation to the assessment and collection of taxes upon the proceeds of mines, except so far as the former acts were inconsistent with the provisions of that act. Indeed, such is the expressed intention of the legislature. Suppose the law provided that actions should be commenced in district courts on Mondays, Tuesdays and Wednesdays of each week, and in justices' courts on Thursdays, Fridays and Saturdays only; that in district courts summons should be issued and served, judgment entered, execution issued and enforced in a certain way and by

certain means stated; that in justices' courts the collection of demands sued on "should be enforced in the same manner in which collection is enforced in the district courts." In such case we judge it would not be claimed that actions in justices' courts should be commenced on the first three days mentioned, and that they could not be brought on the last three, because such a construction would be unnecessary, and would be against the evident intention of the legislature. Before the passage of the act of 1871 the collection of taxes upon the proceeds of mines was enforced substantially in the same manner in which taxes on personal property was enforced; so they have been and may be, since the passage of that law.

The second objection presented by counsel for appellants involves a question both interesting and important in this state. Under the laws of the state, was the court below justified in rendering judgment for the ten per cent. penalty in this action for the collection of taxes upon the proceeds of mines? It is our duty to construe the statutes bearing upon this question according to the real intention of the legislature, but such intention must be gathered from a fair construction of the several acts themselves. The language used and the object to be attained must be considered. If the language is capable of two constructions, one of which is consistent and the other is inconsistent with the evident object of the legislature in passing the laws, that construction must be adopted which harmonizes with the intention. But we cannot ascertain the intention by our own standard of what would have been proper or consistent in the premises. We cannot conclude that the legislature did impose the ten per cent. penalty unless we find it in the law, whatever may be our personal ideas upon the propriety or consistency of its imposition in one class of cases and not in another; and where the language used is susceptible of but one natural, honest construction, that alone can be given. These principles are elementary. (Sedgwick on the Construction of Stat. and Const. Law, 190 *et seq.*)

The provisions of the statute requiring payment of an additional per cent. of the tax in case of delinquency, is

Opinion of the Court—Leonard, J.

penal in its nature and object. Of such statutes in *United States v. Morris*, 14 Peters, 475, the supreme court of the United States says: "In expounding a penal statute, the court will certainly not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet, the evident intention of the legislature ought not to be defeated by a forced and overstrict construction." To the same effect says Mr. Justice Story in *The Schooner Nymph*, 1 Sumner, 516-518.

We do not understand counsel for respondent seriously to claim that the ten per cent. penalty, prior to the statute of 1873 (C. L. 3238), was required to be paid in actions to enforce payment of taxes on the proceeds of mines; but it is urged that the payment of such penalty is required by the last statute. The title of this act is "An act prescribing an additional penalty for non-payment of taxes in certain cases after suit." The act itself is as follows:

"In all suits for the collection of delinquent taxes, originally brought in the district courts, where the amount exceeds three hundred dollars, the complaint and summons shall demand, and the judgment shall be entered, for twenty-five per centum, in addition to the tax, and ten per centum thereon and costs, provided in the act to provide revenue for the support of the government of the state of Nevada and the acts amendatory thereof; and such tax, penalty and costs shall not be discharged, nor shall the judgment therefor be satisfied except by the payment of the tax, original penalty, costs, and the additional penalty herein prescribed in full."

We think this statute is fairly susceptible of but one construction; and that is, that in all suits originally brought in district courts for the collection of delinquent taxes, where the amount of the tax exceeds three hundred dollars, twenty-five per centum of the tax shall be entered as a judgment in addition to the tax and costs; and if in any case, the revenue laws enacted prior to the statute quoted, provide for the ten per centum penalty in that case, then such penalty shall also be entered, in addition to the twenty-five per cent. penalty; but that if in any case where

suit is brought in a district court for taxes exceeding three hundred dollars, the former revenue laws do not provide for the ten per centum penalty, then in such case, it cannot be given under the statute of 1873. To be plain, our opinion is, that prior to this statute, the revenue laws of the state did not require the ten per centum penalty in actions for the collection of delinquent taxes upon the proceeds of mines, and that in such cases, under the statute of 1873, judgment can be rendered only for the tax, the twenty-five per centum penalty prescribed therein, and costs. Let us examine the statute. In the first place, the seventeenth section of article iv. of the constitution provides, that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title." The title to the statute now under consideration is as before stated. It is "An act prescribing an additional penalty"—that is, a penalty in addition to a penalty already prescribed. Then, so far as the title indicates the intention of the legislature, it was to prescribe a penalty in addition to one provided before that statute was passed.

The law itself does require, in terms, that a judgment be entered for a penalty of twenty-five per centum of the tax; but as to the ten per centum of the same, there is no such requirement, except in cases where such per centum was provided in the former statutes to provide revenue. What the legislature plainly intended to do was to require, in the cases mentioned, a more stringent penalty for non-payment of taxes than was then provided. Where the tax exceeded three hundred dollars they meant to create an additional incentive to prompt payment. The several members of the legislature, in common with other citizens, may have thought the ten per centum penalty was imposed in this class of cases, and they may have passed the statute of 1873 under such impression, but a bare recital of their construction of the meaning of former laws in the statute in question certainly did not impose the disputed penalty. (*Bingham v. Board of Supervisors*, 8 Minn. 448.) This statute provides that "such tax, penalty and costs shall not be discharged,

nor shall the judgment therefor be satisfied, except by the payment of the tax, original penalty, costs, and the additional penalty herein prescribed, in full." That is to say, the judgment may be satisfied by payment of the penalty then before prescribed, and the penalty therein prescribed, the tax and costs, and not otherwise. But if in any case there is no original penalty, and the only penalty prescribed by that law is the additional penalty of twenty-five per centum, then the only matters to be satisfied are the tax, the twenty-five per centum penalty and the costs. The "original penalty" referred to is that prescribed by the revenue law of 1865 and the amendments thereto, for there was no other to which it could refer. If the legislature intended by the statute of 1873 to impose a penalty of thirty-five per centum of the tax on the proceeds of mines, where the amount exceeds three hundred dollars, it should have so declared. If it did not intend or wish to impose but twenty-five per centum penalty in such cases, the intended result was accomplished. If it was of the impression that the ten per centum was already imposed in such cases, it was mistaken, and the result is that only twenty-five per centum can be collected.

Suppose a law should be passed by the next legislature prohibiting the sale of intoxicating liquors, prescribing a penalty of one hundred dollars "in addition to the fine of fifty dollars now provided by law for the same offense by the act concerning crimes and punishments," and authorizing a judgment to be entered accordingly. In case of violation, would it be claimed that the fine of fifty dollars, supposed to have been imposed by a prior legislature, could be collected without establishing the fact of its imposition by a law previously enacted? In such case, if an examination of the statutes should reveal the fact that there had been no prior legislation imposing a penalty for such an offense, the conclusion would necessarily be that the legislature was mistaken in fact, and the penalty would be limited to one hundred dollars. Giving the language of the statute of 1873, under consideration, its natural, and to our minds, its only proper meaning, we are entirely satisfied that the

ten per centum penalty claimed in this case could not be included in the judgment against defendants, unless authority therefor can be found in prior statutes. The only sections of other and former laws wherein mention is made of a penalty in tax suits, are 3148, 3154 and 3155 (C. L.) Those sections do not relate to the taxation of the proceeds of mines, but of real and personal property, as defined in sections 3128 and 3129. In the last section personal property, for the purposes of taxation, is defined and specified, and at the last of the section it is provided "that gold and silver-bearing ores, quartz or minerals from which gold or silver is extracted, when in the hands of the producers thereof, shall not mean, nor be taken to mean, nor be listed and assessed under the term 'personal property,' as used in this section of this act, but is specially excepted therefrom, and shall be listed, assessed and taxed as hereinafter provided."

Such provision was made in the act of 1865, commencing at section 99. In that and all subsequent statutes relative to assessment and taxation, as well as to the enforcement of payment by action, the proceeds of mines have been and are treated by provisions appertaining to them alone. In those sections there is nothing said in relation to a penalty in cases where taxes become delinquent. And it would seem that until 1873, the legislature did not intend to impose a penalty in case a tax on the proceeds of mines should become delinquent, for by section 30 of the statute of 1865, and as amended in 1866, and as it still remains, the form of the complaint prescribed requires the district attorney to insert a prayer for ten per centum penalty upon "the tax due on real estate, improvements, and personal property," which does not include the tax upon proceeds of mines, as will be seen by reference to section 5 (C. L. 3129). Then, in section 31 (C. L. 3155), in case of default in actions to enforce payment of taxes upon all property except the proceeds of mines, it is provided that judgment shall be entered "for the amount of taxes, with ten per cent. damages and costs." But turning to the part of the statute which treats of the taxation of the proceeds

of mines and the collection of taxes due thereon, as before stated, there is not the slightest intimation, until 1873, that the legislature intended to prescribe a penalty in case of delinquency. But, on the contrary, there is striking proof that they did not so intend, by the prescribed forms of complaint in actions like this, as well as in actions for the collection of taxes upon real and personal property. In the latter, the form provides a prayer for ten per cent. damages for non-payment, as required by law, while the former requires nothing but the tax and costs. Then section 129 (C. L. 3233) declares that "so far as they are applicable, and not otherwise expressly provided in this act, the answer to the complaint, the means and manner of serving the papers, * * * and in all other matters concerning the collection of delinquent taxes on the proceeds of mines, the laws for the collection of taxes on real estate and personal property, as provided in this act, shall apply to the collection of delinquent taxes on the proceeds of mines." The statute of 1865 was one of the most important laws passed at that or any other session of our legislature, and it bears upon its face evidences of mature deliberation. Under such circumstances it is difficult to arrive at any other conclusion than that the legislature, until 1873, did not intend to require a penalty in cases of this character. If the legislature of 1865 did in fact so intend, it left no evidence of such intention in the statute, and subsequent legislatures, until 1873, in no respect changed the law in this regard.

The court erred in entering judgment for the ten per centum penalty, but we perceive no occasion for a new trial. The judgment may be modified according to the rights of the parties. Plaintiff is entitled to recover judgment for the whole tax, seventy-two thousand eight hundred and fifty-two dollars and three cents; the twenty-five per cent. penalty, eighteen thousand two hundred and thirteen dollars, and four thousand six hundred and fourteen dollars and thirty-nine cents costs, making a total of ninety-five thousand six hundred and seventy-nine dollars and forty-two cents in United States gold coin.

The cause is remanded to the court below with instruc-

Opinion of Hawley, C. J., dissenting.

tions to modify the judgments herein as follows: By inserting the sum of four thousand five hundred and fifty-three dollars and twenty-five cents in place of four thousand nine hundred and fifteen dollars and seventy-six cents, taxed as costs, and entered as the district attorney's percentage; also, by inserting the sum of ninety-one thousand and sixty-five dollars and three cents in place of ninety-eight thousand three hundred and fifteen dollars and twenty-three cents, entered as the total amount of the tax and penalties; also, by inserting the sum of four thousand six hundred and fourteen dollars and thirty-nine cents in place of four thousand nine hundred and seventy-six dollars and ninety cents, entered as the whole amount of costs, including the district attorney's fee and percentage; and the judgment so modified is affirmed without costs of appeal.

HAWLEY, C. J., dissenting:

I concur in the conclusions reached by the court, that this case must be examined and decided upon its merits, and that the ten per centum penalty imposed by section 24 of the revenue act of 1864-5 (Stat. 1864-5, 282; Stat. 1866, 172), does not, by the terms of said section, for the reasons stated in the opinion of the court, apply to suits brought for the collection of delinquent taxes upon the proceeds of mines. But I entertain a different opinion as to the construction that ought to be given to the act approved March 7, 1873. (Stat. 1873, 169, 170.)

In the first place, it must be conceded that the general power of taxation is unlimited; that it rests upon necessity; is inherent in every sovereignty, and essential to the existence of the government. Every individual must bear his portion of the public burdens.

The object of imposing penalties is to secure the prompt payment of the taxes when due, and the imposition of the penalties prescribed by the statute must, in my judgment, be sustained upon the same general principles that support the power of taxation. It seems to me, therefore, that upon principle, the general rule of strict construction, as applied to ordinary penal statutes, has no application what-

Opinion of Hawley, C. J., dissenting.

ever to this case, and I do not understand the court to base its opinion upon this ground.

Statutes imposing penalties for the non-payment of taxes are not, strictly speaking, in derogation of the natural rights of individuals. In the construction of all revenue statutes in relation to the imposition or collection of a tax or penalty, we ought, whenever it can be done without violence to the language used, to so construe the acts as to give effect to the meaning and intention of the legislature, without any reference to strictness upon one side, or favor upon the other. (*Wood v. United States*, 16 Peters, 342; *Taylor v. United States*, 3 How. 210; *Cliquot's Champagne*, 3 Wal. 144; *United States v. Hodson*, 10 Id. 395; *United States v. Breed*, 1 Sum. C. C. 160; *Davy v. Morgan*, 56 Barb. 222; *Cornwall v. Todd*, 38 Conn. 443.) The construction must, as all courts say, seek the real intent of the law-makers. "Courts of justice are bound to give effect to that intent, and are not at liberty to fritter it upon metaphysical niceties." (*The Schooner Nymph*, 1 Sum. C. C. 518.) No interpretation ought to be adopted which would in any manner tend to defeat the object and purpose of the law, if the language used is fairly and honestly susceptible of a construction that will sustain the object which the legislature had in view in passing it. What, then, was the object of the legislature in passing the statute of 1873? This question is very easy of solution. It was, in brief, to compel the prompt payment of taxes, and to prevent delinquencies and delays.

The legislature was evidently of the opinion that the existing penalties imposed in the revenue act were not sufficient to accomplish the desired purpose. It knew that taxes were not only regarded by many people as burdens, but, in the language of the supreme court of Connecticut in the case above cited, "that many look upon them as money arbitrarily and unjustly extorted from them by the government, and, hence, justify themselves and quiet their consciences in resorting to questionable means" for the purpose of avoiding the payment of their taxes, and it determined to oppose this resistance of the taxpayers by the imposition

of a heavy penalty. It would further seem from the language of the act that the failure or refusal to pay the taxes when due came only from the heavy taxpayers, for the penalty is limited to such suits as are "originally brought in the district courts, where the amount" of the tax "exceeds three hundred dollars."

The legislature also knew that the existing penalty of ten per cent. only applied to the collection of delinquent taxes upon real estate and personal property (as distinguished by the express terms of the revenue act from the collection of taxes on the proceeds of mines.) At least, this knowledge ought to be presumed, because each member of the legislature, like every other individual, is *presumed* to know the law.

Now, it seems to me that if the rule of strict construction is to be literally enforced, then the object which the legislature had in view would to some extent be defeated, for it might be argued, with some degree of plausibility at least, that the twenty-five per cent. penalty does not apply to suits brought for the collection of delinquent taxes upon the proceeds of mines; because by a literal and strict interpretation of the language of the act of 1873 it only imposes the twenty-five per cent. as an *additional* penalty to the penalty already imposed upon delinquent taxpayers on real estate and personal property by the "act to provide revenue for the support of the government of the state of Nevada and the acts amendatory thereof," and that it could not be enforced in suits brought for the collection of delinquent taxes against the proceeds of mines, because no *original* penalty was imposed in such cases, and this act only prescribes an *additional*—not an *original*—penalty. And if any effect is to be given to the title of the act as bearing upon the construction of it, then, it seems to me, that this view is strengthened because the title indicates, as the court say, that it was "the intention of the legislature to prescribe a penalty in addition to one provided before that statute was passed," and as no penalty whatever had been provided for against delinquents on the proceeds of mines there could not be any additional penalty against that char-

* Opinion of Hawley, C. J., dissenting.

acter of property. But, as before stated, I do not believe that the rule of strict construction has any application whatever to this case, and, therefore, in examining the act I have endeavored to find the real intention of the legislature, which is the cardinal guide that beacons the pathway of all courts in determining the proper construction to be given to all doubtful statutes, and I have sought to collect this intention from the language of the act itself, viewed with reference to "the occasion and necessity of the law—from the mischief felt and the object and remedy in view." (*Sibley v. Smith*, 2 Mich. 492.)

The court, in *Winslow v. Kimball* (25 Me. 495), in refusing to give a strictly liberal construction to the statute, said: "But statutes are to receive such a construction as must evidently have been intended by the Legislature. To ascertain this we may look to the object in view, to the remedy intended to be afforded, and to the mischief intended to be remedied." In order to get at the intention of the law-makers, where the statute is ambiguous or its language uncertain, courts have never hesitated to sacrifice the letter of the statute to the purpose and object of the legislature wherever it could be done without violence to the language of the statute. I am of opinion that in a case like the present, where it is, as I think, plainly perceivable that a particular intention, though not very clearly expressed, must have been in the minds of the legislators, that intention ought to be enforced and made to control the strict letter of the statute. The legislature, in the act of 1873, made no discrimination, as in previous acts, between delinquents on real estate, personal property or the proceeds of mines. It was intended to apply to all. No suit for the collection of delinquent taxes should thereafter be brought in the district court, where the amount exceeded three hundred dollars, without a demand being made for twenty-five per centum in addition to the ten per centum that had been previously imposed only against delinquent taxes on real estate and personal property, but by this act extended and made applicable to all suits of every kind and character that might thereafter be brought for delinquent taxes where the amount

Opinion of Hawley, C. J., dissenting.

of the tax exceeds three hundred dollars. The limitation—and the only limitation—is in the amount of the tax, not in the character of it.

If the legislature only intended that the twenty-five per cent. should be enforced in cases where, under the revenue acts, the ten per cent. was imposed, why did they not insert after the word “dollars” the words “except in suits brought to recover delinquent taxes on the proceeds of mines?”

If the twenty-five per cent. was only to be enforced in suits brought for delinquent taxes against the proceeds of mines, why should the act provide that no judgment in any suit for delinquent taxes, which necessarily includes the proceeds of mines, should be satisfied except by the payment of the *original penalty* of ten per cent. “and the additional penalty herein prescribed in full?”

It must, as I think, be admitted that the act of 1873, viewed from any standpoint of construction that takes into consideration the previous statute imposing the ten per cent., fails to prescribe in clear and positive terms its exact meaning. But if, in addition thereto, we look at the purpose of the law-makers, their intention is made certain. If it had occurred to the legislature that the ten per cent. was not, by the language used, clearly imposed against the proceeds of mines, I have no doubt that it would have been expressly included so as to prevent any possible misunderstanding of their meaning by any construction whatever.

It is manifest, to my mind, that it was the real intention of the legislature to impose, and that by a reasonable, honest and fair construction of its language, it did impose, the additional and original penalty in “all suits for the collection of delinquent taxes originally brought in the district court, where the amount exceeds three hundred dollars,” whether it be for a tax upon real estate, personal property, or the proceeds of mines, and that the tax for which the suit is brought “shall not be discharged,” nor the judgment therefor satisfied, “except by the payment of the tax, original penalty” (of ten per cent.), the costs, “and the additional penalty” (of twenty-five per cent.).

I think the judgment of the district court was correct and that it ought to be affirmed.

[No. 854.]

STATE OF NEVADA, RESPONDENT, v. CONSOLIDATED
VIRGINIA MINING COMPANY ET AL., APPELLANT.

TAX ON PROCEEDS OF MINES—COLLECTIBLE QUARTERLY—TEN PER CENT.
PENALTY DOES NOT APPLY TO SUCH SUITS. (*State v. California M. Co.*,
853, *ante*, affirmed.)

APPEAL from the District Court of the First Judicial Dis-
trict, Storey County.

C. J. Hillyer, for Appellant.

Lewis & Deal, for Respondent.

By the Court, LEONARD, J.:

The questions involved in this appeal, and those dis-
cussed and decided in the case of *State of Nevada v. Cal. M.*
Co. et al. (No. 853), are the same. Upon the authority of
that decision, the motion to dismiss appeal is denied, and
the judgment herein will be modified. Plaintiff is entitled
to recover from the defendant the whole tax, forty-nine
thousand eight hundred and sixty-five dollars and forty
cents; the twenty-five per cent. penalty, twelve thousand
four hundred and sixty-six dollars and thirty-five cents, and
costs, amounting to three thousand one hundred and
seventy-seven dollars and fifty-eight cents, making a total
of sixty-five thousand five hundred and nine dollars and
thirty-three cents, in gold coin of the United States.

The cause is remanded to the court below, with direc-
tions to modify the judgments herein as follows: By in-
serting the sum of three thousand one hundred and sixteen
dollars and fifty-eight cents in place of three thousand
three hundred and sixty-five dollars and ninety cents, taxed
as costs and entered as the district attorney's percentage;
also, by inserting the sum of sixty-two thousand three
hundred and thirty-one dollars and seventy-five cents, in
place of sixty-seven thousand three hundred and eighteen
dollars and fifteen cents, entered as the total amount of the
tax and penalties; also, by inserting the sum of three thou-

Points decided.

sand one hundred and seventy-seven dollars and fifty-eight cents in place of three thousand four hundred and twenty-six dollars and ninety cents, entered as the whole amount of costs, including the district attorney's fee and percentage; and the judgment so modified is affirmed, neither party to recover costs of appeal.

HAWLEY, C. J., dissenting:

For the reasons stated in my dissenting opinion in *State of Nevada v. Cal. M. Co.* (No. 853), I think the judgment of the district court ought to be affirmed.

[No. 865.]

GEORGE KENNEDY ET AL., RESPONDENTS, v. S.
SCHWARTZ, APPELLANT.

CONTRACT FOR THE SALE OF ORE CONSTRUED—ASSAYS TO BE SAMPLED WHEN.—In a contract for the sale of ore at prices regulated by the assay value per ton, and the ores delivered to be paid for monthly: *Held*, that the assays of the ore were to be averaged at the end of each month, and not taken in separate lots and quantities as delivered.

IDEM—NON-COMPLIANCE OF TERMS OF A CONTRACT—AMOUNT TO BE RECOVERED.—The plaintiff agreed to deliver to defendant one thousand tons of ore within three months. The defendant, on his part, agreed to pay for each one hundred tons, as soon as delivered, one thousand dollars. In an action brought to recover the value of the ores delivered to the defendant: *Held*, that if the defendant had failed to comply with the provisions of the contract, the plaintiff would be entitled to recover the full contract price of all ores delivered; but if the plaintiffs had failed or refused to comply with its terms, they could only recover for each and every one hundred tons of ore indivisible, and would be liable for damages, if any were sustained by reason of their non-compliance with the terms of the contract.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts are stated in the opinion.

J. B. Barker, for Appellant.

R. D. Ferguson, for Respondent.

By the Court, HAWLEY, C. J.:

The plaintiffs, Kennedy and Young, on the fourteenth of August, 1876, were the owners of the Crown Point and Vulcan mines, situate in Hunter mining district, White Pine county. The ores in the Crown Point mine were of high grade in silver, and of low grade in lead. The ores in the Vulcan mine contained a heavy per cent. of lead, but were of low grade in silver, and were valuable to be used as a flux in the smelting of other ores. The defendant, Schwartz, was the lessee of a smelting furnace at Robinson, and was desirous of procuring ores that would enable him to run the furnace with profit.

After examining the character of the ores in the Crown Point and Vulcan mines, negotiations were entered into which resulted in the making of a written contract, by the terms of which the plaintiffs, as parties of the first part, agreed to deliver to the defendant, as party of the second part, within three months after the first day of September, A. D. 1876, at the dumps of said mines, one thousand tons of ore, to be assorted upon said dumps by defendant, on the following conditions, viz.: "1. For all ores delivered, ten dollars per ton in gold coin of the United States; 2. For all of said ores so delivered which have or show an assay value over or in excess of sixty dollars per ton, said second party shall pay to said first parties one half of, or fifty per cent. value of said excess over and above said sixty dollars value, in addition to the ten dollars per ton aforesaid. 3. For all lead ores which assay over thirty per cent. value per ton, said second party shall pay to said first parties twenty-five cents for each per centum of value in excess of said thirty per cent. of assay, and pay the same in gold coin of the United States."

The defendant, on his part, agreed to purchase, receive and pay for said one thousand tons of ore, as follows: "1. For each one hundred tons delivered, so soon as delivered, the sum of one thousand dollars, gold coin of the United States. 2. For any excess of value, as above set forth, over and above the said ten dollars per ton, said second

party shall pay the same to said first parties on the first day of each and every month during and after this agreement."

The defendant also agreed to take "all fine or powdered ores now on the Crown Point No. 2 dumps, without further assorting, at ten dollars per ton gold coin," and bound himself "to take all ores which may be assorted by his men and placed upon said dumps." It was further agreed that "the assay value of all ores may be taken by both parties to this contract, and all differences in the same shall be settled and adjusted by dividing the same between the two in the ratio of said differences."

This action was brought to recover a balance claimed to be due upon the value of four hundred and seventy-nine and eight hundred and eighty-nine two thousandths tons of ore which it is alleged the defendant received and smelted in his furnace.

1. In order to decide some of the questions presented by this appeal, it is necessary to determine whether, under the written contract, the assays of the ore were to be averaged at the end of each month, or whether the assays were to be taken and the value of the ore ascertained in separate lots and quantities as delivered.

The language of the contract is not free from doubt, and to enable us to determine its meaning, we must look at the relative position of the parties at the time the contract was made, and consider the object they had in view. In other words, the contract must be interpreted by a consideration of all of its provisions with reference to the general subject to which they relate, and in the light of the contemporaneous facts and circumstances, so as to arrive at the intention of the parties at the time the contract was entered into. When so interpreted, it seems to us that it was the intention of the parties that assays of all the ore delivered under the contract for each month should be taken and averaged, and that the payments for excess of value over and above sixty dollars per ton should be paid on the first day of the succeeding month. This payment to be in addition to the payments of one thousand dollars for each and every one hundred tons at ten dollars per ton, as specified in the contract.

Opinion of the Court—Hawley, C. J.

Any other construction would leave the results purely accidental. It is shown by the testimony that some of the ore from the Crown Point was very fine powdered ore, and it was sampled and assayed from the sacks when delivered at the furnace, while other portions of the ore were coarse and had to be put through a rock-breaker before being shoveled into the furnace, and the samples and assays of the coarse ores were generally taken after the ore was crushed by the rock-breaker. The powdered ore was richer than the coarse ore. One lot of ten tons of the fine powdered ore had an assay value of one thousand four hundred and forty-nine dollars and eighty cents in excess of the sixty dollars per ton, while one lot of seven tons of the coarse ore had an assay value of one hundred and sixty-one dollars in excess of the sixty dollars per ton. There is nothing in the contract to the effect that the fine powdered ore should be sampled and assayed separate from the coarse ore, or that the samples and assays of the ores from the Crown Point should be kept separate and distinct from the ore from the Vulcan, or that settlements should be made for each and every ton of ore that assayed over sixty dollars per ton, independent and exclusive of the value of other ores that did not assay sixty dollars per ton. The ores seem to have been sampled and assayed in separate lots as taken from the wagons for convenience sake only, and the ores from the Crown Point and Vulcan were kept in separate piles simply to enable the workmen to properly feed the furnace with the different qualities of ore. Several samples were taken and assays made from the ore of the respective mines prior to the signing of the contract. The ores in the Vulcan assayed from nine to ninety dollars per ton in silver, the general average being in the neighborhood of thirty dollars per ton, while the assays of the Crown Point ore averaged about one hundred dollars per ton.

The prevailing idea to be gathered from the language of the contract, as well as from the acts of the parties, seems to be that all the ores delivered would average about sixty dollars per ton. If the average was less it was the defendant's fault, as the privilege of employing assorters to assort

the ores was left to him. If the ores averaged more than sixty dollars per ton, the plaintiffs were protected by the clause allowing them a certain percentage of the excess.

The conclusions reached by the court below in allowing the plaintiffs to recover the assay value of the separate lots of ore that assayed over sixty dollars per ton, without taking into account the general average of all the ore received during the month, is at variance with the views we have expressed, and necessitates a reversal of the judgment.

2. The third finding of the court, to the effect that E. K. Phipps was assayer for both parties is not sustained by any evidence. He was weigher for both parties; but as assayer of the ores delivered under the contract, he acted solely for the plaintiffs.

3. All differences as to the assay value of the ore were settled and adjusted as provided for in the contract, or otherwise agreed upon by the respective assayers, except one lot of one hundred and fifteen tons. There is some testimony tending to show that the assays of this one hundred and fifteen tons were not adjusted, for the reason that neither Cook, the assayer, nor defendant, nor any of his agents, would agree to any such settlement. If, upon a new trial, the weight of evidence sustains this view, it would be the duty of the court or jury to accept the assay of Phipps, if proven to be correct. Neither party ought to reap any benefit by a failure or refusal to comply with the terms of the contract.

4. If the court or jury should find as a matter of fact that plaintiffs were ready and willing at all times to deliver ores to the defendant in accordance with the terms of the contract, and that defendant failed to comply with its provisions, they would be entitled to recover the full contract price for all ores delivered. But if, on the other hand, as defendant contends, the weight of evidence shows that defendant was ready and willing to receive the full one thousand tons, and the plaintiffs, notwithstanding the capacity of the mines to enable them to comply with the terms of the contract, failed and refused to furnish or deliver the ore, they could only recover for each and every one hundred tons of ore

Points decided.

indivisible, and would be liable to defendant for all damages, if any, he sustained by reason of their failure to comply with the contract.

5. The remaining questions which have been argued on this appeal, as to whether there was a verbal agreement changing the written contract so as to specify the proportion of ores to be delivered from the respective mines; or as to the percentage that should be allowed in making the assays, for the shrinkage or dryage of the ores; or in any other particulars, as claimed by defendant, cannot be considered under the present state of the pleadings, as both parties rely solely upon the express terms of the written contract. If, however, the pleadings should be amended in this respect (and it would be the duty of the district court to allow such an amendment if properly asked for), then these questions should be determined in accordance with the evidence that may be offered upon a new trial; the burden of proof resting upon the party seeking to establish any verbal modification or change of the terms of the written contract.

The judgment of the district court is reversed and the cause remanded for a new trial.

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[No. 878.]

HENRY WILLIAMS, RESPONDENT, v. H. F. RICE ET AL.,
APPELLANTS.

STATEMENT ON MOTION FOR NEW TRIAL—WHEN NOT A STATEMENT ON APPEAL.—In construing the provisions of the civil practice act (sec. 197, 332, 333, 335-6): *Held*, that, when an appeal is only taken from the judgment, a statement that had been prepared and used as a statement on motion for a new trial cannot be considered as a statement on appeal. (Beatty, J., dissenting.)

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

R. M. Clarke, for Appellants.

Whitman & Wood, for Respondents.

By the Court, HAWLEY, C. J. :

The transcript on appeal in this case shows that judgment was rendered March 9, 1876; that a statement on motion for a new trial was filed March 14, 1876; that the motion for a new trial was denied August 11, 1876, and the notice of appeal filed September 26, 1876. The appeal is taken from the judgment only. Respondent moves to strike out "the statement on motion for a new trial," and if his motion is granted there will be nothing left for us to consider except the judgment roll.

An appeal from the judgment, without a statement, brings up nothing for review except the judgment roll. (*Howard v. Richards et al.*, 2 Nev. 133; *Klein v. Allenbach*, 6 Nev. 159; *McCausland v. Lamb et al.*, 7 Nev. 238; *Wetherbee v. Carroll et al.*, 33 Cal. 549.)

It is claimed by counsel for appellants that inasmuch as the statement on motion for new trial was filed within the time allowed by law for the preparation of a statement on appeal, this Court ought to consider it as a statement on appeal regardless of the facts that it does not purport to be such a statement and, as admitted on the argument, that it was not prepared, or intended to be used, as a statement of the case on appeal; and it is argued that there is no substantial reason why it should not be so considered.

Does the statute authorize us to so consider the statement? We think not. The statute, in its terms, is clear, plain and explicit; there is no ambiguity, no doubtful meaning. By following its directions we comply with the law, and certainly no more substantial reason could be given for our action. Let us see what the statute requires. Sec. 197 of the civil practice act provides that when the appeal is from an order granting or refusing a motion for a new trial, the statement on motion for new trial "shall constitute, without further statement, the papers to be used on appeal." (1 Comp. Laws, 1258.) There is no other provision of the statute that authorizes the statement on motion for new trial to be considered as a statement on appeal, and it cannot, in our opinion, be otherwise so considered unless there is a stipulation or agreement of counsel to that effect.

Opinion of the Court—Hawley, C. J.

Sec. 332 provides as follows: "When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment * * he shall, within twenty days after the entry of such judgment * * prepare such statement," etc., etc. (1 Comp. Laws, 1393.)

When the statement is prepared and settled or agreed upon, as provided for in said section, "it shall be filed with the clerk," (sec. 335) and "a copy of the statement shall be annexed to a copy of the judgment-roll." (Sec. 336.) But if no such statement is prepared, the party appealing from the judgment "shall be deemed to have waived his right thereto." (Sec. 333.)

Under the provisions of the statute the statement on motion for new trial has a distinct and separate office to perform and is wholly independent of the statement provided for in sec. 332. It is prepared for the purpose of being used—as the statute provides—on motion for a new trial, and when "thus used" it "shall constitute, without further statement, the papers to be used on appeal," and it is only when thus used, and when the appeal is taken from the order granting or refusing a new trial, that the statute authorizes it to be considered as a statement on appeal. This, it seems to us, is the plain meaning of the statute. But we are not without other authority directly upon the disputed point.

In *Burdge v. G. H. and B. R. W. Co.* there was no statement on appeal, but a statement used on motion for new trial. The appeal was from the judgment alone. The decision was rendered prior to the adoption of the statute in question by the legislature of this state. Field, J., in delivering the opinion of the court—Baldwin, J., and Cope, J., concurring—said: "The statement contained in the record was used on the motion for a new trial, and we can only examine the action of the court below in denying the motion. The judgment cannot be reviewed except through the order made upon the motion, and from such order there is no appeal. * * This leaves the case to stand upon the judgment-roll." (15 Cal. 198.)

In *Levy v. Gettleston* the facts were different, but the de-

cision fully sustains the conclusions we have reached. Shafter, J., in delivering the opinion of the court, in which all the justices concurred, said: "One of the questions presented is, whether it is error for a district court to refuse to settle a 'statement' made in support of a motion to set aside a nonsuit, or to refuse to entertain a motion to amend such statement after it has been filed and served on the opposite party, or error to grant an order striking such statement from the files of the court. The district courts cannot be called upon to review a case upon the testimony, nor upon an allegation of errors of law occurring at the trial, except in the way pointed out in the practice act. That method is simple and straightforward, and in our judgment, was intended to exclude all others. If the plaintiff desired to have the nonsuit entered against him investigated upon its merits in the district court, he should have moved for a new trial upon a statement; or, if he preferred to bring the case to this court directly, he could have done so by an appeal from the judgment, aided by a statement annexed to the roll. There is a statement in the transcript, *but it does not purport to be a statement on appeal from the judgment.* The result is that the court did not err in refusing its sanction to a method of reviewing decisions made in the course of a trial, altogether unknown to our system." (27 Cal. 688.)

If appellants desired to have the assignments of error, as set forth in the statement on motion for a new trial, reviewed by this court they should have taken an appeal from the order of the district court refusing a new trial. Not having pursued the course clearly pointed out by the statute, they have, in law, waived their right to have the statement on motion for a new trial considered. The motion of respondent is allowed, and there being no statement annexed to the judgment-roll, as provided for by the statute, there is nothing properly before us for review except the judgment-roll. In that, it is admitted, no error appears.

The judgment of the district court is affirmed. Remittitur forthwith.

Opinion of Beatty, J., dissenting.

BEATTY, J., dissenting:

In my opinion the statement contained in this record, although it is entitled, "statement on motion for new trial," can and ought to be treated as a statement on appeal. The statute is not responsible for the phrases "statement on appeal" and "statement on motion for new trial." These are merely convenient forms of expression which have come to be employed in order to designate the purpose for which a statement has been made or the manner in which it has been used. They are not the law and do not determine the rights of parties. What the law provides for, and all that it provides for, in speaking of appeals as well as of new trials, is a statement of the case. A new trial, it is true, may be granted, and the order of the district court granting or refusing it, may be reviewed in this court on a variety of grounds that we cannot consider on an appeal direct from the judgment, so that usually a statement on motion for new trial contains a great deal that does not properly belong to a statement made solely with reference to an appeal from the judgment. But when errors in law occurring during the trial have been excepted to by the losing party (which is the case here) he has the choice to bring them to this court for review on appeal direct from the judgment; or to first move for a new trial, and if it is denied, appeal from the order; or after his motion is overruled, if the time for appealing from the judgment has not expired, he may ignore the proceedings on the motion and still appeal direct from the judgment. This last is what has been done in the present case, not through choice, but by inadvertence in failing to mention the order in the notice of appeal. It is not questioned that there is a good appeal from the judgment, but it is held that the statement, from which alone error can be made to appear, having been entitled "statement on motion for a new trial," and used to support such a motion, cannot be regarded on this appeal, notwithstanding it contains precisely the same matters, was made in precisely the same manner and authenticated and transmitted with the same formalities and by the same officers as if it had never

Opinion of Beatty, J., dissenting.

been designed to subserve any other purpose than to support the appeal that has been taken. The defendants are deprived of the right of having their appeal heard and decided upon its merits merely because an unnecessary and superfluous designation, unknown to the law, was put upon a statement, which, in all essential respects, is a perfect statement of the case, whether designed to be used on a motion for new trial or on appeal. There might be some force in such a reason if anybody had been deceived or misled, induced to waive any right or relax any vigilance, by the act of the party in calling his statement a statement on motion for a new trial. Nothing of the kind, however, is or can be pretended, and the statement is stricken from the record simply and solely because it purports to be a statement on motion for a new trial, and because, in the opinion of the court, the statute does not authorize us to consider such a statement except on an appeal from the order.

This conclusion is deduced from the language of section 197 of the practice act, which, in the opinion of the court, contains the only provision authorizing a statement on motion for new trial to be considered as a statement on appeal. If the statute had anything to say about "statements on motion for new trial," or "statements on appeal," or if the two things were incompatible in their nature, the argument would be more satisfactory. But, as I have said, what the statute provides for is a statement of the case, and when the matters to be reviewed are errors in law excepted to during the trial, there can be but one statement of them, no matter what the object of making it. The only difference is that if the party aggrieved wishes to move for a new trial he must file and serve his statement within ten days after the judgment, whereas, he may take twenty days if he only designs to appeal. In this case the statement was settled, engrossed, certified and filed within five days after judgment. It was in time for a motion for new trial, and necessarily in time for a statement on appeal. It is admitted to be a correct statement, minutely specifying numerous alleged errors occurring and excepted to during the

Opinion of Beatty, J., dissenting.

progress of the trial. It was made and settled, certified and filed in exact conformity with every requirement of sections 332, 333, 334, 335 of the practice act, and a copy is annexed to a copy of the judgment-roll in the record before us. (Sec. 336.) But it was entitled "statement on motion for new trial," and notice was given that it would be used to support such a motion, and it was so used. Therefore, it is not and cannot be a statement of the case on appeal from the judgment. Why? Because the name is of more importance than the substance of things? Or did the use of the statement in the district court spoil it?

I admit that what is called a statement on motion for a new trial may be, and generally is, something very different from a statement on appeal. But there are cases, and this is one of them, where they may be exactly the same. It is true the motion for a new trial in this case was partly based upon the ground that the verdict was contrary to the evidence, and all the evidence was included in the statement, which, for the purposes of an appeal from the judgment, was perhaps unnecessary. But the fact that it contains something more than is necessary invalidates it no more than the fact that it was filed and served sooner than was necessary.

The provision of sec. 197, upon which the conclusion of the court is entirely based, does not, in my opinion, control the operations of sections 332-3-4-5-6. If, in making a statement of the case, with a view to moving for a new trial under section 197, those sections are also fully complied with, there is a statement which those sections authorize to be used on appeal from the judgment. The fact that it may be used, and was actually designed for another purpose, only proves that the party "builted better than he knew." He is not estopped from changing his mind unless by so doing he would gain some unfair advantage over his adversary.

It may be argued, and in fact such seems to be the argument, that the express provision of section 197 permitting a statement that has been used in support of a motion for a new trial, to be used in connection with other papers as a

Opinion of Beatty, J., dissenting.

statement on appeal from the order granting or refusing a new trial, is an exclusion of all other modes of using it on appeal. But such a construction in a case like this would bring section 197 and the sections above referred to in conflict, whereas they may be very easily reconciled. The general rule is that on appeal from an order a statement, if one is desired, must be made within twenty days after the order (sec. 332), and in the absence of the special provision of section 197, the party appealing from an order granting or refusing a new trial would have to make a new statement, so that a sufficient *raison d'être* for that provision is to be found in the fact that it was desired to save litigants the trouble of making the statement over again. It allows a statement made before the order to be used the same as if it was made after the order, and it also allows affidavits, pleadings, depositions, etc., to be used as a statement in connection with it. It is, in my opinion, a severe and unauthorized application of the rule of *expressio unius* to say that section 197 precludes the use of a statement on motion for new trial as a statement on appeal when it has been made in conformity to those sections of the act regulating the making of statements on appeal, and is admitted to be a correct statement of the case. A better application of the rule might be made to the first clause of section 333. "If the party shall omit to make a statement within the time limited, he shall be deemed to have waived his right thereto." Here the party did not omit to make the statement, and therefore he cannot be deemed to have waived his right thereto.

I admit that before the statute was adopted in this state, it had been construed in California as it has been construed by the court here. But those decisions, which only have the effect of denying a party the right of being heard on the merits of his case, are not protected by the principle of *stare decisis*. If they are sustained by reason, they are entitled to respect, but not otherwise. This court, indeed, has shown but little deference to the construction given to the practice act by the supreme court of California before its adoption here, even in those cases where parties

 Points decided.

relying on its received construction were deprived of important rights. For instance, in *Reynolds v. Harris*, 8 Cal. 617, it was decided that the findings of the district court need not be put into a statement in order to entitle them to be considered on appeal. If there is anything in the doctrine that a statute of one state, when adopted by another, is to be held to have been adopted with its received construction, that decision was protected, though erroneous, by the principle of *stare decisis*; and yet it was repudiated unhesitatingly in *Imperial Co. v. Barstow*, 5 Nev. 254, and has never been followed in this state. Other instances might be cited, but this is sufficient to show that this court has never considered itself bound by the California decisions construing the practice act.

The cases referred to by the court in 15 and 27 Cal. merely follow the rule of *Lower v. Knox*, 10 Cal. 480, and that case seems to have been decided upon the ground that the statement was not filed in time. They are based upon no reasoning whatever, and the last one (27 Cal. 687), did not involve the question presented by this case, for by reference to the report it will be seen that the statement was defective in substance, in not specifying the errors which would be relied on. It was not a good statement for any purpose, whereas the statement before us is a good statement in every essential respect, and was made in time.

For these reasons I dissent.

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 [No. 857.]

DUNCAN S. THOMAS, APPELLANT, v. J. D. SULLIVAN
ET AL., RESPONDENTS.

SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION—STATUTE OF FRAUDS.

—Upon a review of the facts: *Held*, that the change of possession of the personal property sold by K. on behalf of J. & K. to plaintiff, was not sufficient, as against creditors, to satisfy the statute of frauds.

IDEM—INSTRUCTIONS—INTENT OF PARTIES—CIRCUMSTANCES OF SALE.—*Held*, that the court erred in refusing to give the following instructions to the jury: "In making up your minds on the validity of the sale claimed by plaintiff, you should take into consideration all the circumstances sur-

Argument for Appellant.

rounding the same; the situation of the parties; the solvency or insolvency of Jones & Kimerley; whether Thomas was acquainted with their circumstances, or believed or had reason to believe them in debt; the character of the notes given; that they were payable only to one of the firm; whether the trade was within the legitimate business of the partnership business, and the action of the parties; and if, from all you believe, the sale was not in good faith, and for a valuable consideration, you will find a verdict for defendant."

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

D. E. Baily, for Appellant.

I. There is nothing in the evidence in this case to justify the court below in granting a new trial. The verdict should not be disturbed in cases of this character, except it appears that flagrant injustice has been done. It is the undoubted right of the jury to weigh the evidence, and they are the exclusive judges of its effect. The presumptions of law are that the evidence warranted the verdict. (*Doll v. Anderson*, 27 Cal. 248; *Folsom v. Root*, 1 Id. 374; *Livermore v. Stine*, 43 Id. 274; *Scoles v. Universal Life Ins. Co.*, 42 Id. 523; *Crossett v. Wheelan*, 44 Id. 200; *Johnson v. Dainpirt*, 3 J. J. Marsh's Rep. 391; *Garland v. Milling*, 6 Geo. 310; *Lavel v. Cromwell*, S. C. Const. Rep. 593; *Wait v. McNeil*, 7 Mass. 261; *Salmons v. Webb*, 12 B. Monroe, 365; *Allen v. Jarvis*, 20 Conn. 38; *Fowler v. Etna Fire Ins. Co.*, 7 Wend. 270; *Jackson, ex. dem. Fowler, v. Loomis*, 12 Id. 27; *Largan v. Cent. R. R. Co.*, 40 Cal. 273; *Wing Chung v. Los Angeles*, 47 Id. 531.)

II. The granting or refusing a motion for a new trial is a matter not of discretion in the court below, but of sound legal judgment. (*Sacramento & Merdith M. Co. v. Showers*, 6 Nev. 296; *Holman v. Dord*, 12 Barb. 336; *Tonstal v. Bishong*, 2 A. K. Marsh, 521; *Giles v. State*, 6 Geo. 276; *Bulkley v. Waterman*, 13 Conn. 328; *De Fonclear v. Shottenkirk*, 3 John. 170; *Douglas v. Tousey*, 2 Wend. 352; *Brook v. Bicknell*, 4 McLean, 70; *Newell v. Wright*, 8 Conn. 319; *Bacon v. Parker*, 12 Id. 212; *Bishop v. Perkins*, 19 Id. 300; *Kelly v. Jackson*, 6 Peters, 622; *Trenor v. C. P. R. R. Co.*, 50 Cal. 222; *Iburg v. Suanel*, 47 Id. 265; *Price v. Sturges*,

Opinion of the Court—Leonard, J.

44 Id. 591; *Kile v. Tubbs*, 23 Id. 431; *Lyle v. Rolins et al.*, 25 Id. 437; *Lawrence v. Burnham*, 4 Nev. 365; *Scott v. Haines*, 4 Id. 427.)

III. The motion for a new trial in this case should have been denied.

John T. Baker, for Respondent.

A new trial will not be granted by an appellate court when denied by the *nisi prius* judge, on the ground of the insufficiency of the evidence to justify the verdict, unless the evidence so clearly preponderates in favor of the party asking a new trial as to lead to the conclusion irresistibly that the verdict was wrong. (Gray. & Wat. on New Trials, vol. 3, 1207-8; *Phillpotts v. Blasdell*, 8 Nev. 61; *State v. Joseph Stanley*, 4 Id. 71; *The State v. Yellow Jacket S. M. Co.*, 5 Id. 415; 20 Cal. 48; 24 Id. 419; *Eagle Bank v. Smith*, 5 Conn. 71; *Wilkinson v. Parrott*, 32 Cal. 102; *Wilkcoxon v. Burton*, 27 Id. 232; *Speck v. Hoyt*, 3 Id. 413; *Smith v. Bellet*, 15 Id. 23; *Hanson v. Barnhisel*, 11 Id. 340; *Kimball v. Gearhart*, 12 Id. 27; *Scamell v. Strahle*, 9 Id. 177; *Weddle v. Stark*, 10 Id. 401; *Preston v. Keys*, 23 Id. 193; *Treadway v. Wilder*, 9 Nev. 70.)

Hillhouse & Davenport, also for Respondent.

By the Court, LEONARD, J.:

In July, 1874, and prior thereto, William Jones and W. L. Kimerley were copartners in coal and wood business in Eureka county. They had formerly owned two wood ranches, but on the twenty-eighth day of July, 1874, they had but one, which was known as the "Gunn ranch." They owned teams, which were required in carrying on their business. At the time of the sale of the property to plaintiff, hereinafter mentioned, Jones & Kimerley, as copartners, were indebted to different parties, among whom were defendants, Oberfelder and Harrison, whose claim was two thousand two hundred and thirty-eight dollars and ninety-four cents, for goods sold and delivered to Jones & Kimerley. On the third of August, 1874, Oberfelder and Har-

Opinion of the Court—Leonard, J.

risson brought suit against Jones & Kimerley to recover the amount of their claim, and attached the property described in the complaint herein. Defendant Sullivan, as sheriff of Eureka county, served the writ by taking the property into his possession. Oberfelder and Harrison obtained judgment for the full amount of their claim, and this action was brought to recover of defendants the value of the property attached and taken by them, stated to be one thousand six hundred dollars. Defendants, in their answer, admitted taking the property described, but justified the same by alleging that it was, at the time of the attachment, the property of Jones & Kimerley; that plaintiff's claim thereto was fraudulent; that if any transfer of said property was ever made, such transfer was for the purpose of hindering, delaying, and defrauding the creditors of Jones & Kimerley, and particularly Oberfelder and Harrison, defendants herein, and that such transfer was without consideration and void. A jury trial was had, and plaintiff obtained judgment against defendants for the alleged value of the property attached, one thousand six hundred dollars. Defendants moved for a new trial, on the grounds that the jury gave excessive damages; that the verdict was against law; that errors in law occurred at the trial, and that the evidence did not justify the verdict. The motion was granted by the court upon the last ground stated, and this appeal is taken from the order granting a new trial.

The record does not disclose wherein the evidence was regarded as insufficient by the court, nor has counsel for respondent, in his brief, directed our attention to any particular wherein it was insufficient. The statement is incomplete, and the result is that the most important questions touching the merits of the case cannot be decided.

Counsel for appellant urges us to disregard the statement on motion for a new trial, so far as it relates to the assignment that the evidence does not justify the verdict, on the ground that there are no sufficient specifications of particulars wherein the evidence is alleged to be insufficient. As to some of them, we think the criticism of counsel is just; but the last is full and explicit. It is "that no change of possession of property on the ranch was shown."

Opinion of the Court—Leonard, J.

At the trial, plaintiff claimed, and introduced evidence tending to prove, that on the twenty-eighth day of July, 1874, Kimerley, on behalf of Jones & Kimerley, sold and delivered to him the personal property described in the complaint, and also the said "Gunn ranch;" that a portion of said personal property was at the time upon the ranch, and consisted of wood, coal, and coal sacks; that the consideration of the sale was two promissory notes signed by him, and made payable on demand to Kimerley alone; plaintiff and Jones testified to the effect that Kimerley was authorized by Jones to sell the property; also, that subsequent to the sale and before the attachment, Jones was notified of the acts of Kimerley; but upon the questions of previous authority and subsequent ratification, defendants proved the testimony of Jones, given under oath before Judge McKenney, subsequent to the attachment, which tended to show that the sale by Kimerley was unauthorized by Jones, and that the latter did not ratify the acts of the former before the attachment.

Plaintiff testified that Kimerley delivered to him a bill of sale of the personal property on the ranch, and of the ranch itself, but the record contains no transcript of the same.

Upon the question of delivery of the property on the ranch, plaintiff testified that on the twenty-eighth day of July, 1874, Kimerley delivered to him the ranch and the wood, coal and coal sacks thereon; that he stopped on the ranch two or three days; that he asked Gunn, who had been burning coal for Jones and Kimerley for seventeen and one half cents a bushel, to continue burning for him upon the same terms, and that Gunn agreed to burn for him as he had been doing for Jones and Kimerley; that he then went to Sulphur, where he had left the team; stayed there all night; went to the ranch, loaded with coal and went to Eureka, where the sheriff attached the wagon and coal therein, on the third day of August; that the sheriff attached the cattle, seven head, on the fifth day of August; the balance of the coal, a portion of the coal sacks and all the wood were attached on the ranch. Plaintiff testified

that he was to pay the notes by hauling coal, and was to have time to do so. It does not appear that he gave any security for their payment. He had due him \$600; owned horse, saddle and bridle, and two coal ranches, the value of which is not stated. He did not assume any debts of Jones & Kimerley; did not know whether Jones & Kimerley owed Oberfelder & Harrison anything or not; knew that the latter had furnished the former with goods, but was not certain that there was any indebtedness by reason thereof; made, no inquiries as to what Jones & Kimerley owed; thought it was none of his business. Jones testified that the property Kimerley sold to plaintiff was all the property that the firm had left; that the reason why the sale was made was because Kimerley said Oberfelder & Harrison would close down on them; that they wanted their men to get their pay; that he and Kimerley had a quarrel and concluded to close out. He also stated that neither he nor Kimerley was on the ranch after the sale; but it does not appear that either of the partners was on the ranch at any time before the sale, or that any one remained there except Gunn, who still remained in the employ of plaintiff as he had previously done for Jones & Kimerley.

Aside from a conveyance and delivery of the ranch by Kimerley, the only evidence before us of a continued change of possession of the personal property attached thereon, is this: plaintiff stopped on the ranch two or three days. But so did Gunn, as he had formerly done; and there is no proof that plaintiff exercised any acts of ownership over the ranch or personal property thereon during the two or three days he was there; and during the whole time before the attachment, the only act performed by him that indicated a claim of ownership or possession, so far as the record shows, was loading up a certain amount of coal after getting the team from Sulphur, and taking it to Eureka. We do not think this proof was sufficient as against creditors of Jones & Kimerley, to satisfy the statute of frauds. But aside from the fact that a bill of sale, signed by Kimerley alone, purporting to convey the ranch and the personal property thereon, was admitted in evidence against defend-

Opinion of the Court—Leonard, J.

ants' objection, the testimony above stated is all the proof given to establish a delivery and continued change of possession of such property. The bill of sale is not before us, and consequently we cannot know that it was such an instrument in writing as the statute requires as a conveyance of an interest in lands. We do not know whether the whole title of Jones and Kimerley, or Kimerley's alone, or of neither, was conveyed thereby.

Without previous authority or subsequent ratification before the attachment, Kimerley could not sell or convey Jones' half interest in the ranch, although it be true that the bill of sale was sufficient in form and substance on its face to convey the whole title; and upon the question of such authority and ratification, we have seen that there was great conflict of testimony. But whatever the real facts may be as to the conveyance of the ranch, as before intimated, the case, as presented on this appeal, is the same as though there had been no attempted sale of the real property. However, the order granting a new trial must be sustained for another reason. At the trial defendants requested the court to instruct the jury as follows:

"In making up your minds on the validity of the sale claimed by plaintiff, you should take into consideration all the circumstances surrounding the same, the situation of the parties: the solvency or insolvency of Jones and Kimerley; whether Thomas was acquainted with their circumstances, or believed or had reason to believe them in debt; the character of the notes given; that they were payable only to one of a firm; whether the trade was within the legitimate business of the partnership business, and the action of the parties; and if from all, you believe the sale was not in good faith, and for a valuable consideration, you will find a verdict for defendant." The refusal of the court to give this instruction is assigned as error. The intent of parties to a sale can never be ascertained except by a consideration of all the facts attending it. If their intent was fraudulent the sale is void, although a full price was paid by the vendee. (Bump on Fraud. Conveyances, 231.) No witness can look into the minds of the parties, and thus be able to swear positively that they intended to defraud the

creditors of the vendor; and hence, fraud can generally be shown only by facts and circumstances which tend directly or indirectly to establish it. No one act or declaration may establish it, but the whole, when considered in the light of surrounding circumstances, may show it to the satisfaction of court and jury. "These acts and declarations, and all concomitant circumstances, must be established, and then the motive may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct. The proof in each case will consequently depend upon its own circumstances. It usually consists of many items of evidence, which, standing detached and alone, would be immaterial, but which, in connection with others, tend to illustrate and shed light upon the character of the transaction, and show the position in which the parties stand, and their motives, conduct and relations to each other." (Bump, 560.) There was no fact or circumstance mentioned in that instruction which should not have been "taken into consideration" by the jury. There was no fact or circumstance legitimately developed at the trial that should not have been taken into consideration by them in deciding upon the question of the intent of both parties to the sale. This instruction would have directed the jury, among other things, to take into consideration the fact that the notes given by plaintiff were payable to Kimerley alone. This, at first blush, may seem to take from the jury the consideration of the question whether the notes were or were not so payable. But that fact was conceded by plaintiff. In fact, he so testified. So, upon this point, there was no question of fact to go to the jury.

The instruction offered was correct and important, and the refusal to give it was error that may have been prejudicial to defendants. For this error alone, the court did not err in granting defendants' motion for a new trial; for although the order was made on the ground that the evidence was insufficient to justify the verdict, it is well settled that "a wrong reason will not vitiate or affect a correct judgment or result." (*Scott v. Haines*, 4 Nev. 428.)

The order of the district court granting a new trial is affirmed.

[No. 881.]

STATE OF NEVADA, RESPONDENTS, v. NORTHERN
BELLE MILL AND MINING COMPANY, APPELLANT.

TAX ON PROCEEDS OF MINES—DEDUCTION OF FIFTEEN DOLLARS PER TON—
FREIBURG PROCESS.—The mine-owner working his ores under the Freiburg process is not entitled to an exemption of fifteen dollars per ton in addition to the actual cost of working the ore. (*State v. Eureka Con. M. Co.*, 8 Nev. 15, affirmed.)

THIS was a suit for taxes delinquent upon an assessment of the proceeds of defendant's mine, for the quarter ending March 31, 1877. In making the assessment the assessor deducted, from the gross yield of the ore extracted, the total cost of extraction, transportation and reduction, and computed the tax upon the balance remaining after those deductions. (2 Comp. Laws, secs. 3245, 3246.) The defendant claimed that it was entitled to a still further deduction of fifteen dollars per ton on the amount of ore reduced during the quarter, by reason of the fact that it was worked by the Freiburg process. The defendant pleaded and proved a tender of the amount of the tax on the net proceeds less the fifteen dollars per ton claimed by it as an additional exemption. The state recovered judgment for the larger amount as computed by the assessor. The defendant appeals from the judgment and from an order overruling its motion for a new trial.

A. W. Crocker and T. W. Davies, for Appellant.

J. R. Kiltrell, Attorney-general, and *M. A. Murphy*, for Respondents.

Per Curiam. The only question involved in this case, viz: whether the mine-owner whose ore is worked by the Freiburg process is entitled, after the deduction of the entire cost of extraction, transportation and reduction, to a further deduction from the net proceeds of the mine of fifteen dollars per ton, to be exempt from taxation—was decided adversely to the appellant, after a full and thorough discussion and upon perfectly conclusive reasoning, in the case of the *State v. Eureka Con. M. Co.*, (8 Nev. 22 to 24.) On the authority of that case the judgment and order appealed from are affirmed.

Opinion of the Court.

[No. 874.]

J. W. BROWN, RESPONDENT, v. L. A. ASHLEY,
APPELLANT.

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DIVERSION OF WATER—FORM OF JUDGMENT—COSTS.—In actions for the wrongful diversion of water the court is authorized to enter a decree in favor of plaintiff for the water, and to tax the costs of the action against the defendant, irrespective of the amount of the judgment for damages.

APPEAL from the District Court Fourth Judicial District, Humboldt County.

This was an action brought by plaintiff against the defendant, for the alleged wrongful conversion of water. The complaint is in the usual form, and prays judgment for damages; a decree that plaintiff is entitled to the water; that defendant be enjoined from diverting it; for costs and for general relief. The defendant filed an answer denying the allegations of plaintiff's complaint, asserted ownership in himself, and asked for judgment for his costs. The jury found a general verdict in favor of the plaintiff, and assessed the damages at one hundred and fifty dollars.

Upon this verdict, judgment was rendered in favor of the plaintiff, for the sum of one hundred and fifty dollars, and plaintiff decreed to be the owner of the land and water rights mentioned in the complaint; that he is entitled to have the water of the stream therein designated unobstructed except that defendant might use such portion of said water as might be necessary for domestic purposes but not for irrigation, and that plaintiff recover his costs taxed at one hundred and ninety-two dollars and fifteen cents.

M. S. Bonnifield and Wells & Stewart, for Appellant.

Grass & Harding, for Respondent.

Per Curiam. Appellant claims that the only judgment authorized by the pleadings was a judgment for damages, and that the judgment being for less than three hundred dollars, the court erred in taking the costs against appellant.

Opinion of the Court.

The pleadings in our opinion fully authorize the judgment as entered. In actions of this character, for the wrongful diversion of water, it is the usual and proper practice for the courts, to tax the costs against the party who is in the wrong irrespective of the amount of damages recovered, and such action is fully authorized by the provisions of the practice act of this state. The judgment of the district court is affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
 STATE OF NEVADA.
 APRIL TERM, 1878.

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| 18 | 253 |
| 18 | 440 |

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| 13 | 253 |
| 23 | 948 |

[No. 869.]

**IN THE MATTER OF THE APPLICATION OF M. J. ROURKE
 FOR A WRIT OF CERTIORARI.**

CERTIORARI—WHEN ISSUED.—The writ of certiorari can only be issued where the inferior tribunal, in the exercise of judicial functions, has exceeded its jurisdiction.

IDEM—JUSTICE OF THE PEACE—ISSUANCE OF EXECUTION A MINISTERIAL ACT.—A justice of the peace, in issuing an execution upon a judgment, acts ministerially, and such act, however erroneous, cannot be reviewed upon certiorari.

APPEAL from the District Court, Third Judicial District, Lyon County.

The facts appear in the opinion.

Lindsay & Dickson, for Appellant.

In issuing an execution the justice acted ministerially and not judicially. (27 Cal. 495; 17 Cal. 464.) Certiorari reviews acts of a judicial nature only, not those which are merely ministerial. (4 Cal. 344; 5 Wait's Pr. 459-60; 4 Cowen, 297; 3 Wend. 468-70; 17 Wend. 15; 2 Hill, 9; 5 Barb. 43; 65 Barb. 170.)

Jno. A. McQuaid, George W. Keith, and Ellis & King, for Respondent.

By the Court, LEONARD, J. :

Petitioner, M. J. Rourke, applied to the third judicial district court for a writ of certiorari. In his petition he stated in substance that, on a prior date, to wit: June 15, 1877, he was served with a summons issued out of the justice's court, Silver City township, in Lyon county, which commanded him to appear before said court, at the time and place stated therein, to answer the complaint of Mark Strouse and C. M. Foster, filed in said court, by which plaintiffs claimed judgment against petitioner for the sum of two hundred dollars, besides costs; that petitioner appeared at the time and place stated in the summons, and remained for more than one hour thereafter; that neither the justice of the peace of said court nor plaintiffs, or either of them, appeared, and that petitioner had no opportunity of appearing in, or defending, said cause; that without notice to him, and about twelve hours after the time stated in the summons, said court rendered judgment against petitioner for two hundred dollars and forty-seven dollars and fifty cents costs of suit; that execution had been issued upon such judgment against him to a constable in Storey county, in this state, who was about to execute the same; that he had been advised by his attorney that said judgment was wholly illegal, and that he had no remedy by appeal therefrom, or any other plain, speedy or adequate remedy at law in the premises. Whereupon the court issued the writ prayed for, and at the proper time the justice of the peace certified to the district court a transcript of the record and proceedings in said cause, and after reviewing the same, "ordered and adjudged that the execution upon said judgment heretofore issued in said action out of said justice's court, to wit: on the twentieth day of June, 1877, directed to the sheriff or any constable of Storey county, be and the same is hereby declared illegal and void, and the same is hereby annulled; that the order made by this court on the twenty-sixth day of June, 1877, staying all proceedings upon said judgment against said petitioner, M. J. Rourke, be rescinded and set aside, and that said peti-

Opinion of the Court—Leonard, J.

tioner have judgment against A. Tait, justice of the peace of Silver City Township, for his costs in this action, taxed at thirty-four dollars and thirty cents, in United States gold coin."

The justice of the peace, Alexander Tait, appeals from "that portion of the judgment of the district court by which it was adjudged that the writ of execution mentioned by said petitioner in his petition herein, should be withdrawn by the said Alexander Tait, and that the said petitioner should have and recover from the said Alexander Tait all his costs herein."

The district court sustained the judgment of the justice's court, but held that the issuance of an execution directed to the sheriff or any constable of Storey county, before a transcript of the judgment of the justice's court had been filed and docketed in the office of the clerk of the district court, was illegal, and the execution void. (Sec. 1618, C. L.)

The conclusion of the court may have been correct, as an abstract legal proposition, but we think a consideration of the validity of the execution, or the legality of its issuance, was not within the scope of the court's inquiry. The statute provides that "the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer," etc. It will be seen that the only proceeding that can be reviewed is a judicial proceeding.

People v. Bush, 40 Cal. 346. The justice exercised judicial functions in rendering judgment, but as to that proceeding the district court held there was no excess of jurisdiction. But no judicial functions were exercised by the justice when he issued the execution. It was a mere ministerial act that required the exercise of no judicial functions.

In *Kyle v. Evans et al.*, 3 Ala. 482, the court say: * * * "The issuance of an execution upon a judgment is an act purely ministerial in its character; it involves no process of reasoning or deduction from other facts, but is merely the legal consequence of the judgment previously rendered; and therefore this duty is performed by the clerk, when there is one attached to the court. A justice of the peace

Opinion of the Court—Leonard J.

has no clerk, but this does not alter the character of the act; he is both judge and clerk of his own court."

In *Matthews v. Houghton*, 11 Me. 301, the court held that "a magistrate does not act judicially in making up and completing his record. In doing this, he performs, himself, what this court does by the agency of its clerk. It is a mere ministerial act." (See *Kelly v. Van Austin*, 17 Cal. 565; *Wallace v. Eldridge* [No. 1], 27 Cal. 497; *State of Nevada v. Cal. M. Co.*, recently decided by this court.)

Section 1280, C. L., provides that "where the execution is against the property of the judgment-debtor, it may be issued to the sheriff of any county in the state."

Section 1618 provides that "the justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the clerk of the district court for the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted by him thereon, and entered in the docket, and from that time executions may be issued by the clerk on such judgments to the sheriff of any other county in the state, in the same manner as upon judgments recovered in the higher courts."

These sections must be construed together, and it is undoubtedly true that a valid execution to the sheriff of another county can be issued only by the clerk of the district court of the county wherein the judgment was rendered, after a transcript of the judgment has been filed and docketed in his office. But, although the justice had no right or authority to issue an execution to the sheriff of Storey county, it was a mere ministerial act which the district court could not review upon *certiorari*, and in so doing it erred. The only judicial acts performed by the justice were such as the court sustained. Such being the case in the proceedings on *certiorari*, respondent should not have been adjudged to pay the costs.

The portion of the judgment of the district court appealed from is reversed, appellant to recover his costs of appeal.

Argument for Respondent.

[No. 860.]

A. W. SWAN, RESPONDENT, v. A. J. SMITH ET AL.,
APPELLANTS.

13 257
16 177

ACTION OF TROVER—FORM OF VERDICT.—The jury, in an action of trover, found a verdict in favor of plaintiff "for the possession of the personal property described in the complaint, and if a return thereof cannot be had then," etc. The court, in entering judgment, followed the language quoted: *Held*, that the pleadings did not authorize such a finding; that this part of the verdict was mere surplusage, and that it ought to have been disregarded in entering judgment, and that the judgment should be modified.

APPEAL from the District Court, First Judicial District, Storey County.

The facts are stated in the opinion.

Lindsay & Dickson, for Appellants.

C. H. Bellnap, for Respondent.

I. That portion of the verdict touching the right of the plaintiff to the possession of the property, is surplusage, and should be disregarded. (*Gregory v. Frothingham*, 1 Nev. 262; *Bacon v. Callender*, 6 Mass. 303; *Wyndham v. Williams*, 27 Miss. 318; *People v. Ah Kim*, 34 Cal. 189; *Dunlap et al. v. Hayden*, 29 Ind. 303; *Gover v. Turner*, 28 Md. 604; *Tucker v. Cochran*, 47 N. H. 57; *Lincoln v. Hapgood*, 11 Mass. 358; *Wood v. May*, 3 Cranch, C. C. 172; *Duane v. Simmons*, 4 Yeates, 441; *Patterson v. United States*, 2 Wheat. 222; *Gibson v. Lewis*, 27 Mo. 532; 17 Serg. R. & 297.) It cannot be urged against a verdict that it is too broad, if every essential matter put in issue is concluded by it. (*McRae v. Colclough*, 2 Ala. 74; *U. S. v. Stereoscopic Slides*, 1 Sprague, 467.) The finding of facts not necessarily involved will not vitiate a verdict, when enough is found to decide the issue. (*Tuby v. Mauzey*, 4 B. Mon. 5; *Lively v. Ball*, 2 Id. 53; *Riggs v. Maltby*, 2 Met. (Ky.) 88.)

II. Rejecting the surplusage in the verdict, the jury have found all the facts necessary for this court to render a proper judgment in this case. It should not, therefore, subject the parties to the delay and expense of a new trial,

Opinion of the Court—Leonard, J.

but should modify the judgment by the entry of a judgment in trover. (*Myers v. Kendrick*, 13 Iowa, 599; *Woodward v. Howard*, 13 Wis. 557; *Fitzhugh v. Wiman*, 5 Seld. 559; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Johnson v. Carnley*, 10 Id. 570; 5 Serg. & R. 130; *Persse v. Cole*, 1 Cal. 370; *Ellis v. Jeans*, 26 Id. 272; *Union W. Co. v. Murphey's F. F. Co.*, 22 Id. 632; *Atherton v. Fowler*, 46 Id. 320; *Foucault v. Pinnet*, 43 Id. 136.)

By the Court, LEONARD, J. :

Plaintiff alleges that, on the twenty-eighth day of September, 1876, he was the owner and in possession of the goods and chattels described in his complaint, of the value of two thousand dollars in United States gold coin; that while he was so the owner and in possession of said goods and chattels, the defendants unlawfully took the same from his possession, carried them away and still unlawfully detains said property from plaintiff; that at the time of said conversion by defendants, plaintiff was the proprietor of the European restaurant in Virginia city, and as such proprietor, was carrying on and conducting a lucrative business, of the value of two hundred dollars per month to plaintiff; that by reason of the unlawful taking and detention of the said property, plaintiff's business was completely broken up and destroyed, whereby he was damaged in the sum of three thousand dollars, United States gold coin, and a judgment for the amount last stated is prayed for, besides costs of suit.

Defendants denied plaintiff's ownership, and the alleged value, beyond two hundred dollars. They admitted the taking and detention; but denied that either was unlawful; denied that plaintiff was the proprietor of said restaurant; denied that the value of the business of said restaurant to plaintiff was two hundred dollars per month, but did not deny that it was to him of the value of one hundred and ninety-nine dollars and ninety-nine cents per month; denied that plaintiff was damaged in any sum whatever. They did not deny breaking up and destroying plaintiff's business, except as above stated.

Opinion of the Court—Leonard, J.

They justified the taking and detention by alleging that, prior to the seizure of the property by defendant Smith, hereinafter mentioned, defendant Strouse had obtained a judgment in justice's court, Virginia township No. 1, against one Emma Knapp, which was unsatisfied; that an execution was duly issued upon said judgment, by virtue of which defendant Smith, as constable of said township, duly levied upon said property and took the same into his possession, as the property of Emma Knapp, and that to the best knowledge and belief of defendants, said goods and chattels were the property of said Emma Knapp at the time of the levy and seizure. None of the evidence is contained in the record.

The jury found the following verdict: "We, the jury, find for the plaintiff for the delivery of the possession of the property described in the complaint, and if a return thereof cannot be had, then for the sum of eight hundred and twenty-five (\$825) dollars, the value of said property, with interest at the rate of ten per cent. per annum from the twenty-eighth day of September, 1876, to the present time, and the sum of four hundred (\$400) dollars as damages.
E. WILLIAMS, Foreman."

Judgment was thereupon entered "for the delivery of the possession of the property described in the complaint, and if a return thereof cannot be had, then for the sum of eight hundred and twenty-five (\$825) dollars, the value of said property, with interest at the rate of ten per cent. per annum from the twenty-eighth day of September, 1876, to the present time, and the sum of four hundred (\$400) dollars damages, together with plaintiff's costs of suit," etc.

Appellants appeal from the judgment and assign as error:
1. "Error in the verdict in this, to wit: That it finds for the plaintiff for the return of the property claimed in the complaint, and if return thereof cannot be had, then for its value, etc.; appellants claim that the verdict should have followed the complaint, which does not ask for a return of the property, but is a complaint in trover for the value of the property; that a verdict in the alternative respondent was not entitled to; 2. Error in the judgment in this, to

Opinion of the Court—Leonard, J.

wit: That said judgment is in the alternative for a return of the property, and if a return thereof cannot be had, then for its value, etc., to which appellants make the same objection as above specified to the verdict."

We think counsel for appellants are correct in their conclusions, and we have no doubt that the court below would have made the necessary correction had its attention been called to the error complained of. No complaint is made other than that stated above. The case was evidently tried upon the issues made by the pleadings, but the jury found for plaintiff "for the delivery of the possession of the property described in the complaint, and if a return thereof cannot be had, then," etc.

They had no power or authority to find the portion just quoted, because the pleadings did not allow it; and such finding was as much a nullity as though they had found plaintiff entitled to the possession of any other property not described in the complaint. It is the duty of the jury to decide the issues made by the pleadings according to the evidence, but they cannot decide other issues. This finding ought to have been disregarded in entering the judgment, although it should have been corrected before the jury was discharged from the case, as doubtless it would have been, as before stated, had the attention of the court been called to the error. But the objectionable part of the verdict is mere surplusage, and aside from that part, all the issues made in the case are decided. The judgment follows the verdict, and all the relief to which plaintiff was entitled under the pleadings and findings of the jury, is found outside of the portion awarding a delivery of possession of the property to plaintiff. (*Easton v. Worthington*, 5 S. and R. [Pa.] 132; *McRae et al. v. Colclough*, 2 Ala. 81; *Lincoln v. Hapgood*, 11 Mass. 358; *Duane v. Simmons*, 4 Yeates, 442; *Leineuweaver v. Stoeper*, 17 S. and R. 297; *Patterson v. United States*, 2 Wheat. 223; *Frederick v. Commonwealth*, 4 B. Mon. 7; *United States etc. v. One Case Stereoscopic Slides*, 1 Sprague, 468-9; *Myers Adm'r v. Kendrick Adm'r*, 13 Iowa, 599; *Gregory v. Frothingham*, 1 Nev. 262.)

The cause is remanded, with directions to the court be-

Argument for Appellant.

low, to strike from the judgment the following, to wit: "1. For the delivery of the possession of the property described in the complaint, and if a return thereof cannot be had, then;" also the words, "the value of said property," next following the words "eight hundred and twenty-five (\$825) dollars," and insert in lieu of the last, the words, "the value of the property described in the complaint herein."

The judgment so modified is affirmed, appellant to recover the costs of appeal.

[No. 846.]

JOHN S. SHOEMAKER ET AL., RESPONDENTS, v. A. J.
HATCH ET AL., APPELLANTS.

BOUNDARIES OF LAND—WATER COURSES.—The water-course, and not the meander line by which it is surveyed, is the boundary of the fractional subdivision of land.

IDEM—ISLAND, WHEN PART OF THE LAND.—To determine the question of fact, whether a bar or island is part of the land upon either side of the stream, the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel, must all be taken into account.

DAMAGES FOR RIGHT OF WAY IN CONSTRUCTING A WATER DITCH.—Under the act of congress of July 26, 1866, the defendant had the right to construct his ditch across the public lands of the United States, and could not be held responsible in damages for the digging of the ditch, to any party who came into possession of said land after the ditch had been completed.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion of the court.

Boardman & Varian, for Appellant.

I. The Truckee river is a navigable stream within the meaning of the acts of congress, its status as such is established, so far as the United States is concerned, by the refusal of the government to extend its surveys over it. (Sec. 2395-6.) A recognition of the Truckee as navigable is found in the act of the legislature of the territory of Ne-

Opinion of the Court—Beatty, J.

vada. (Statutes 1862, 106.) Commerce may be carried on between California and this state by means of this river, by floating logs and timbers. (*The Daniel Ball*, 10 Wall. 563; *The Montello*, 20 Id. 441; *Thompson v. Androscroggin Co.*, 54 N. H. 548; *Morgan v. King*, 35 N. Y. 459; 31 Mich. 337.)

II. The two channels from the river and the south bank is on the south side of the south channel, and not on the north side of the land claimed by appellants; therefore respondents' patent carries them to the water's edge of the south channel. (*Railroad Co. v. Schurmier*, 7 Wall. 280; *Kraut v. Crawford*, 18 Iowa, 549; *R. R. Co. v. Schurmeir*, 10 Min. 82; *Lammers v. Nissin*, 4 Neb. 252.)

III. No title or right to the lands granted to the state of Nevada passed or vested until selection was made by the state. There might be a grant of quantity, but certainly the title attached to no specific tract until the state, under its power, made selection. Under the act of congress (Rev. Stat. 2339) appellant built his ditch and appropriated the water to useful and beneficial purposes. The right of way was expressly granted and confined to him. All subsequent purchasers deriving title from the United States, took subject to his agreement. (*Cen. P. R. R. Co. v. Dyer*, 1 Sawyer, 646; *Hobart v. Ford*, 6 Nev. 86; *Broder v. Natoma W. & M. Co.*, 50 Cal. 623.)

Thos. E. Hayden, for Respondents.

I. Upon the purchase of the land on the tenth day of July, 1871, the title related back to July 24, 1866, and became a grant *in presenti* of that date. (*Layton v. Farrell*, 11 Nev. 455; *Heydenfeldt v. Daney G. & S. M. Co.*, 10 Nev. 290.)

II. The case of the *R. R. Co. v. Schurmier*, 7 Wall. 272, is in fact and law conclusive in favor of respondents in this action.

By the Court, BEATTY, J.:

This cause was tried in the district court without a jury, and the findings and judgment were for the plaintiffs. The motion of the defendant, Hatch, for a new trial was over-

Opinion of the Court—Beatty, J.

ruled, and he has appealed from that order and the judgment. The statement of the case, which was settled by agreement of the attorneys, and purports to contain all the evidence, certainly fails to justify the decision of the court. Instead of referring particularly to the several findings of the district judge that are unsupported by the evidence, it will be sufficient to make a brief statement of the facts proved. For this purpose the findings will be followed, except where they are opposed to the evidence.

It appears that the Truckee river flows through section 12 of township 19 north of range 19 east, Mount Diablo base and meridian, in a direction a little north of east. In the north-west quarter of section 12 the river divides into two permanent, well-defined channels, which reunite in the north-east quarter, forming an island containing about ten acres. The northern channel is straight, and carries more of the water of the river at all seasons than the southern channel, which makes a considerable deflection, first to the south and then back to the north. More or less water flows in the southern channel at all stages of the river, except in the season of extreme low water, when, in ordinary years, it ceases to flow (although it stands) in the channel. In the year 1864 or 1865 a survey of this section was made by the United States surveyor for Nevada. In making the survey the sectional and subdivisional lines were not extended across either channel of the river. Fractional subdivisions were laid off bounding or abutting upon the south side of the south channel and upon the north side of the north channel, both of which were defined by meander lines. The island seems not to have been surveyed; but whether or not it was delineated on the official plat does not appear, as neither the plat nor the field notes were put in evidence. In December, 1871, the defendant Hatch procured a survey to be made, under our state law, of all the land lying between the meander lines of the United States survey for some distance above and below the island, and under that survey claims the right of possession of the island and of the strip of land along the south bank of the river between the water and the meander line.

Opinion of the Court—Beatty, J.

In July, 1871, Haydon, for himself and his co-plaintiff, applied to the state register, in accordance with the provisions of "An act to provide for the selection and sale of lands granted by the United States to the state of Nevada" (Stats. 1871, p. 135), to purchase three fractional subdivisions of this section 12, containing about seventy-one acres; and at the time of making his application deposited the full amount of the purchase-money. For some reason the selection of the lands by the state agents was greatly delayed, and it was not until January, 1875, that a patent from the state was finally issued. The land so purchased is bounded on the north by the Truckee river, for a distance of something more than half a mile, and at its eastern end lies opposite the western end of the island.

Pending Haydon's application to purchase, and before the land applied for had been selected by the state, and necessarily before any approval of such selection, the defendant Hatch relying, as he says, upon the grant of the right of way in the act of congress of July 26, 1866 (14 Statutes at Large, p. 253), had commenced and completed a ditch by which he diverted a large quantity of water from the Truckee river and conducted it upon his own land for the purpose of irrigation and to supply a tannery which he was carrying on. This ditch follows the south bank of the Truckee river and extends along the front of the land purchased by Haydon for more than half a mile. There is no evidence that at the time the ditch was constructed any one was in possession of the land, and Hatch swears that no one opposed or protested against its construction.

Such being the case; this action was commenced in October, 1876, to recover possession of the land between the meander line of the United States survey on the south side of the Truckee and the middle thread of the main channel (the north channel) of the river, including about two acres of the west end of the island. There were counts also for damages for detention of the land and for the digging and maintenance of the ditch. The judgment of the court was for restitution of the demanded premises, including the west end of the island, and for damages in the sum of five hun-

Opinion of the Court—Beatty, J.

dred dollars, assessed as the value of the right of way for the ditch, which was by the judgment confirmed to the defendant Hatch.

The two assignments of error principally relied upon are:

1. That the court erred in holding that the northern channel of the Truckee river instead of the southern channel was the northern boundary of the land of plaintiffs; and, 2. That it was error to allow any damages for the right of way of the ditch.

As regards the first point, it is claimed by the respondents, and not denied by the appellant, that low-water mark and not the meander line is the boundary of their land; and it is not denied that in this action the plaintiffs were entitled to recover from the defendant the land between the meander line and low-water mark on the river. (*See Railroad Company v. Schurmeir*, 7 Wal. 286-7, and other cases cited in the briefs.) The question is, what is the river? Respondents claim that the northern or main channel alone can be considered as the river channel, and that what has been called an island, although surrounded by running water at all ordinary stages of the river, is not an island, but is part of their land lying between the meander line of the survey and low-water mark. To sustain this position they cite and rely upon the case just referred to, which in many respects was extremely like this case. There are, however, essential points of difference. The river there in question was the Mississippi, and the island, so to call it, was at the time of the survey a mere sand-bar about ninety feet wide and one hundred and sixty feet long, separated from the main land by a channel or slough twenty-eight feet wide. The slough in that case was absolutely as large as the south channel of the Truckee in this case, but relatively to the stream, the main Mississippi river, it was extremely insignificant; the island was a mere sand-bar, entirely submerged in high water and of insignificant size in low water. No notice was taken of it in making the survey, the meander line being run on the land side of the slough. The purchaser of the adjoining fraction claimed the bar; it was filled in so as to raise it above high

Opinion of the Court—Beatty, J.

water, used as a landing for steamboats before and after it was filled in, and covered with valuable improvements. After all this a railroad company procured a new survey to be made by a United States surveyor and undertook to claim the land (then increased to nearly three acres in size and immensely enhanced in value) under a Congressional grant of certain odd numbered sections. On the facts of the case it was decided that the bar was included in the first survey as a part of the main land. But here the facts are different. The two branches of the Truckee river are both permanent, well defined channels. The northern is the shorter, and necessarily has more fall, and in low water carries all the running water, but there is no disparity in the size or appearance of the channels, and the land between is not an insignificant little sand bar, overflowed in high water and liable to be cut away by a change of the current. It is truly an island, and, compared with the size of the stream, a large island. A glance at the map shows to a demonstration that the intention of the surveyor was to meander the southern channel, and not to include the land north of it in the subdivisions purchased by Haydon. To allow the claim of respondents would give them only about two acres of the west end of the island as a part of a fractional subdivision containing ten or fifteen acres, but by the same rule the owner of the next fractional subdivision on the east, which contains not more than five or six acres, would take as parcel of his purchase about eight acres of the island. This shows to what absurd consequences it would lead if the case of *The Railroad Company v. Schurmeir* were held to establish the principle that where a river has two channels, one of which ceases to flow at low water, land surveyed as bounding upon that channel will take all the land between it and low-water mark on the main channel. As before remarked, that case was decided on its own peculiar facts, and no general principle applicable to this case can be extracted from it, except that the water-course, and not the meander line by which it is surveyed, is the boundary of the fractional subdivisions. To determine whether a bar or island is part of the land on either side of a stream, account must be taken

Opinion of the Court—Beatty, J.

in every case of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel. It is a question of fact to be determined from all the surrounding circumstances, whether the land between the meander line and the shore of the lake or water-course is included in the survey. (See *Lammers v. Nissen*, 4 Neb. 251, and *Granger v. Swart*, 1 Woodworth's C. C. Rep. 90.) In this case we conclude from the facts proved and found by the court that the island in question was not included in the land surveyed on the south side of the south channel.

It is unnecessary to decide the question incidentally discussed by counsel as to whether the Truckee is a navigable stream within the meaning of the laws regulating the public surveys. It is conceded to be a highway for the floatage of wood and timber, and has been treated by the officers of the government as a navigable stream. Their action upon the matter is conclusive, so far as this case is concerned, and the district court held correctly that low-water mark, and not the middle thread of the stream, was the proper boundary of the lands of plaintiffs. Its only error as to this point consisted in treating the northern channel as the only navigable channel of the river, and the island as a part of the main land on the south of the stream.

With reference to the second assignment above mentioned, the respondents contend, as was held by the district court, that the state, by relation, was the owner of the land purchased by Haydon from and after the date of his application to purchase and his deposit of the purchase-money—that is to say, from and after July 10, 1871—and consequently that the appellant is bound to pay them for the right of way of his ditch, constructed in 1873. In support of this position they cite *Layton v. Farrell*, 11 Nev. 455; *Heydenfeldt v. Daney Co.*, 11 Nev. 290; *Courchaine v. Bullion M. Co.*, 4 Nev. 374, 377, and *Barnes v. Sabron*, 10 Nev. 240. We think none of those cases are in point. What was said in *Layton v. Farrell* and *Heydenfeldt v. Daney Co.*,

Points decided.

as to the time the grant of the sixteenth and thirty-sixth sections took effect and vested the title in the state, has no application to grants of quantity of lands to be selected. As to such grants, the doctrine is that when the selections of the state are approved the title of the state relates back to the date of selection and no further. (*Paterson v. Tatum*, 3 Sawyer C. C. R. 166.) There is nothing in *Barnes v. Sabron* inconsistent with this; nothing, in fact, that remotely implies anything to the contrary. In *Courchaine v. Bullion Co.*, it was held for reasons that were perfectly valid that the right of the pre-emptioner related back to the date of the filing of his declaratory statement, but those reasons are totally inapplicable to this case. There is no doubt that up to the date of the selection of these lands by the state they remained a part of the public lands of the United States, and the appellant had a perfect right to construct his ditch across them under the act of congress of July 26, 1866 (see 14 Stats. at Large, 253), subject only to the liability therein imposed of paying for any damages to the possession of a settler on the lands. There is no evidence that the lands were possessed by any one other than the appellant when the ditch was dug, and it is expressly admitted that they were not selected by the state until after the ditch had been completed. As this view entirely disposes of respondents' claim for damages on account of the ditch, it is not necessary to determine whether they are a proper subject of litigation in this action.

The judgment and order appealed from are reversed, and the cause remanded.

[No. 877.]

A. STEVENSON & SON, RESPONDENTS, v. J. J. MANN,
IMPLEADED WITH WM. SMITH, APPELLANT.

JURISDICTION—JOINT JUDGMENTS, LAPSE OF TERM—MOTION TO SET ASIDE.—

A joint judgment was entered against S. & M. M. alone moved to have it set aside as to him. The term lapsed before this motion was heard. At the hearing the court set aside the judgment as to M., whereupon the plaintiff moved to have the judgment also set aside as to the defendant S. This motion was granted. *Held*, that the court had jurisdiction upon the motion of M. to set the judgment aside as to both defendants.

Argument for Appellant.

APPEAL from the District Court Fourth Judicial District, Humboldt County.

The facts are stated in the opinion.

Grass & Harding and Seth Robinson, for Appellant.

I. The judgment against Smith, rendered at the January term, merged and extinguished the notes in controversy in the higher security thus obtained. The order of the court, at the July term setting aside the judgment of the previous January term as to Mann, left such judgment in full force as to Smith. If the plaintiffs had proceeded against Smith alone, and taken judgment against him, such judgment, under the code and common law alike, would be a merger and extinguishment of the obligation as to both parties. (*Robertson v. Smith*, 18 Johns. 459; *Pierce v. Kearney*, 5 Hill. 82; *Mason v. Eldred*, 6 Wall. 231; *Brady v. Reynolds*, 13 Cal. 31; *Tinkum v. O'Neale*, 5 Nev. 93; *Truman on Judgments*, § 231.) Under the code, in an action against two or more parties who are liable upon an obligation, a judgment against one may be relied upon by the others as a bar to that or any other action. (*Sloo v. State Bank of Ill.*, 1 Scam. 428; *Sloo v. Lea*, 18 Ohio, 279; *Stearns v. Aguirre*, 6 Cal. 176; *Ricketson v. Richardson*, 26 Id. 149; *Kelly v. Bandini*, 50 Id. 530; *Bank of Stockton v. Howland*, 42 Id. 129; *The People v. Frisbie*, 18 Id. 402; *Levis v. Clarkin*, 18 Id. 399; *Stoddart v. Vandyke*, 12 Id. 437; *Rowe v. Chandler*, 1 Id. 167.)

II. The order of the court, passed at the July term setting aside the judgment of the previous January term as to Smith, was void. A judgment cannot be set aside or modified after the term at which it was rendered. (*Wood v. Luce*, 4 McLean, 254; *Atkinson v. Stevens*, 7 J. J. Marsh, 237; *Trustees v. Baily*, 10 Fla. 238; *McKindley v. Buck*, 43 Ill. 488; *Smith v. Wilson*, 26 Id. 186; *Blair v. Russell*, 1 Ind. 516; *Cook v. Wood*, 24 Ill. 295; *Cameron v. McRoberts*, 3 Wheat. 591; *Bank v. Moss*, 6 How. 31; *Bobb v. Bobb*, 2 A. K. Marsh. 240; *Assessors v. Dorsey*, 2 Wash. C. C. 433; *Kelley v. Keizer*, 3 A. K. Marsh. 268; *Jenkins v. Eldridge*, 1

Argument for Appellant.

Wood. & Min. 61; *Murphy v. Merritt*, 63 N. C. 502; *Sagory v. Bayless*, 13 S. & M. 153; *Bank v. Lewis*, 13 S. & M. 226; *Townsend v. Chew*, 31 Md. 247; *Windet v. Hamilton*, 52 Ill. 180; *Cox v. Brackett*, 41 Id. 222; *Messervey v. Beckwith*, 41 Id. 452; *Brush v. Robbins*, 3 McLean, 486; *State Savings v. Wilson*, 49 Ill. 171; *McKnight v. Strong*, 25 Ark. 212; *Ex parte Morris*, 44 Ala. 361; *Denton v. Boyd*, 21 Ark. 264; *Ragsdell v. Green*, 36 Tex. 193; *Freeman on Judgments*, sec. 96; *Baldwin v. Kramer*, 2 Cal. 582; *Morrison v. Dapman*, 3 Id. 255; *Suydam v. Pitcher*, 4 Id. 280; *Carpentier v. Hart*, 5 Id. 406; *Robb v. Robb*, 6 Id. 21; *Shaw v. McGregor*, 8 Id. 521; *Branger v. Chevalier*, 9 Id. 172; *Swain v. Naglee*, 19 Id. 127; *Bell v. Thompson*, 19 Id. 707; *Latimer v. Ryan*, 2 Id. 628; *Wilson v. McElroy*, 25 Id. 169; *Hegeler v. Hinckel*, 27 Id. 491; *Casement v. Ringgold*, 28 Id. 335; *Killipp v. Empire Mill Co.*, 2 Nev. 34; *Whitmore v. Shiverick*, 3 Id. 299; *Lobdel v. Hall*, 3 Id. 523; *State v. First Nat. Bank*, 4 Id. 358; *Clark v. Strouse*, 11 Id. 76; *Bethel v. Bethel*, 6 Bush. 65; *Mayor etc. v. Bullock*, 1 Eng. 282; *Buckles v. Northern Bank*, 63 Ill. 268; *Rowan v. People*, 18 Id. 159; *Lampsett v. Whitney*, 3 Scam. 170; *Rawdon v. Ropley*, 14 Ark. 203; *Chipman v. Bowman*, 14 Cal. 157; *Sanchez v. Carriaga*, 31 Id. 172; *Logan v. Hillegrass*, 16 Id. 200.)

The district court might have directed the judgment of the January term to stand, but that the same should not be a bar to any defense on the merits which Mann might interpose. It might have opened the judgment to let in such a defense, without vacating it; it might have granted any less relief than that demanded, or qualified it in any reasonable manner, and thus saved the rights of the parties. But this course was not taken. (*Wardell v. Eden*, 2 Johns. Cas. 258; *McCall v. McCall*, 54 N. Y. 541; *Fleming v. Jencks*, 22 Ill. 475; *Lake v. Cook*, 15 Id. 353; *Lyon v. Boylvin*, 2 Gilm. 629; *Glomlinger v. Hazzard*, 4 Phil. 354; *Spang v. Commonwealth*, 12 Pa. St. 358; *Gallup v. Reynolds*, 8 Watts. 424.) The court could not, upon the motion of Mann to set aside the judgment *as to him*, step beyond and over the limit and subject of the relief thus sought, and also set it aside as to his co-defendant Smith, the term at which the judgment was

Argument for Respondents.

rendered having lapsed before the decision of the motion. (*Knox County Bank v. Doty*, 9 Ohio, 505.)

III. The motion of Mann continued the power of the court over the judgment to all intents and purposes. A motion by one defendant to set aside the judgment as to him, and a motion by another defendant (or by the plaintiff) to set aside the judgment as to him, are independent, substantive motions.

IV. The position of respondent, that by granting Mann's motion there resulted, *ipso facto*, a new judgment against Smith, is not correct. Where an order is made vacating judgment as to one of several defendants, the judgment remains unaffected as to the others. (*McKinley v. Tuttle*, 34 Cal. 235; *Silvers v. Reynolds*, 17 N. J. L. 275; *Glonninger v. Hazzard*, 4 Phila. 354.)

Wells & Stewart, for Respondents.

I. Merger cannot arise from an act, not of the party, but opposed by him. Plaintiffs did not seek a judgment; did not accept a judgment, against Smith alone. Merger cannot be forced upon a party. (38 Ind. 86; *Freeman on Judgment*, title "Merger," 215 *et seq.*; 4 Nev. 358, 426.)

II. When the defendant Mann moved the court to vacate the judgment as to him, the plaintiff could not foresee that it would be sustained; hence, as it was not ruled upon until that term of court had lapsed, plaintiffs could not make a motion to vacate it as to Smith, until the very instant they did do so.

III. The court did wrong, prejudiced the plaintiffs, by setting aside the judgment as to Mann, which ruling was opposed by them; and as soon as made, they, to preserve their rights against both defendants, asked the court to set the judgment aside as to Smith, also, and thus not only preserve their rights against both, but deprive Mann of the benefit of his own wrong.

IV. The jurisdiction was saved by the motion of Mann to vacate the judgment as to him. That gave the court jurisdiction to grant his motion just as asked, or to grant it coupled with something else, as it might deem right. (5 Cal. 406; 8 Id. 521; 19 Id. 706; 19 Id. 127; 7 Id. 443.)

M. S. Bonnifield, also for Respondents.

By the Court, HAWLEY, C. J. :

This action was brought to recover the sum of fifty thousand dollars, or thereabouts, the amount claimed to be due from Wm. Smith and J. J. Mann, doing business as copartners under the firm name and style of "Smith & Mann," upon certain promissory notes executed by them in their firm name.

The complaint and summons were regularly served upon the defendant Smith, in the month of May, 1876. In the month of August, 1876, the defendant Mann entered "his appearance in said action," and asked of the court "a reasonable time in which to plead therein." No time was fixed for him to plead. No pleadings were filed. On the second day of January, 1877, the clerk noted the default of both defendants, and on the twenty-third of February, 1877, the court ordered a judgment by default to be entered, and it was entered, against both defendants, for the amount prayed for in plaintiff's complaint.

The defendant Mann, at the same term, moved the court to annul, set aside and declare void the said default and judgment so far as the same in any manner affected him. Pending this motion, the January term lapsed. At the April term, 1877, the motion was argued and taken under advisement. At the July term, 1877, the court granted the motion, and set aside the judgment as to the defendant Mann. On the same day, on motion of plaintiff's counsel, the court also set aside the judgment as to the defendant Smith.

The defendant, Mann, then filed an answer setting up, among other defenses, the judgment of the January term, 1877, as a bar to the action against him.

On the trial, subsequently had, the defendant, Mann, objected to the introduction of each note sued on, upon the ground "that since the commencement of this action, and since the service of summons on the defendant, Smith, and the appearance of the defendant, Mann, herein, the plaintiffs have obtained and taken a judgment herein against the

defendant, Smith, which judgment is still in force as to said Smith, whereby the said note and all the notes and indebtedness alleged in the complaint have been merged and extinguished in a higher security, and import no subsisting joint indebtedness or liability of the said defendants, Mann and Smith."

The court overruled the objection, and admitted the notes in evidence.

The defendant, Mann, moved for a nonsuit and for a dismissal of the action against him upon the same ground. Both motions were overruled by the court. Judgment was again entered in favor of plaintiffs and against both defendants.

Appellant's counsel argue that the order of the court, made at the July term, setting aside the judgment of the previous January term as to the defendant Mann, left such judgment in full force as to the defendant Smith; that the judgment against Smith rendered at the January term merged and extinguished the notes in controversy in the higher security thus obtained, so that afterwards no judgment could be taken or action maintained on such notes against Mann. These positions are sought to be maintained upon the ground that the order of the court made at the July term setting aside the judgment of the previous January term as to Smith was void.

Did the court have jurisdiction to make the order setting aside the judgment as to Smith after the January term, at which said judgment was entered, had lapsed?

The facts of this case are dissimilar from the case of *Sloo v. The State Bank of Illinois*, 1 Scam. 428. In that case the State Bank, defendant in error on appeal and plaintiff in the court below, voluntarily accepted a judgment against both defendants, Sloo & McClintoc (doing business as copartners, under the firm name of A. G. Sloo & Co.), that was entered by virtue of a power of attorney authorizing a confession of judgment. The power of attorney was executed in the firm name by McClintoc, without any authority from his copartner Sloo. Upon appeal the supreme court reversed the judgment as to Sloo, against whom it had been

Opinion of the Court—Hawley, C. J.

entered without authority. The supreme court of Ohio, in *Sloo v. Lea*, 18 Ohio, 279, held that the judgment of the court in Illinois against McClintoc was a bar to any further action upon the same subject-matter, as to the defendant Sloo. These, and other, cases cited by appellant sustain the general proposition, that where the contract sued upon is joint, and the plaintiff by his own voluntary action accepts or consents to a judgment against one of two or more defendants, the other defendants may rely upon that judgment as a bar to that or any other action against them upon the same contract. (*Tinkum v. O'Neale*, 5 Nev. 93; *Freeman on Judgments*, secs. 231, 232, and authorities there cited.)

The decisions sustaining this rule are very numerous. They proceed upon the ground that by the recovery of such a judgment, the cause of action has been merged and extinguished in the judgment against one "by operation of law, at the instance and by the act of the creditor." The creditor is deprived of his right to collect against the others, because by accepting the judgment against one, he has placed himself in a position where he is unable, legally, to assert or enforce his demand. (*Suydam v. Barber*, 18 N. Y. 470; *Barnett v. Juday*, 38 Ind. 88.) The facts of this case, however, do not bring it within the reason of the rule applied in the cases referred to.

In this case, the court at the January term acquired jurisdiction to enter the judgment against both Smith and Mann. The voluntary appearance of defendant Mann was "equivalent to personal service of the summons upon him." (Civil Practice Act, sec. 35.) The default and judgment at the January term were properly entered. Appellant's position, therefore, is, that by his own act in asking to have the judgment that was legally entered against him set aside, so as to allow him to make a defense, and in obtaining the order setting aside the judgment as to him, without the consent of plaintiffs, he has relieved himself from all liability upon the causes of action embraced in the judgment. This position cannot be sustained upon principle, and is not supported by any authority to which our attention has been called.

Upon the motion made by the defendant Mann, the court had jurisdiction to grant him any relief that he was legally entitled to. It was not bound to either allow or reject the relief in the precise terms asked for. If the court was of opinion that the defendant Mann had a good and meritorious defense to the merits, and that he had been improperly deprived of making his defense by the entry of the default against him, it might, under his motion have opened the judgment, in order to let in his defense, without setting it aside as to either defendant. (*Lake v. Cook*, 15 Ill. 353; *Fleming v. Jencks*, 22 Ill. 475; *Glonninger v. Hazzard*, 4 Phil. 354.) But the mode of granting the relief is within the control of the court (*McCall v. McCall*, 54 N. Y. 541), and it was the duty of the court, in granting any relief, to protect the rights of other parties. Instead of opening the judgment in order to let in Mann's defense, the court could have granted his motion on condition that the judgment should also be set aside as to the defendant Smith. The jurisdiction of the court to make such an order is unquestionable.

Appellant technically relies upon the mere form, instead of the substance, of the orders made in the court below. It is contended that the order setting aside the judgment as to Smith was made upon the plaintiffs' motion, and it is, thereupon, argued that inasmuch as the term at which the judgment was entered had lapsed without any such motion having been made by the plaintiffs, the court had no jurisdiction to grant their motion. But, in our opinion, the question is not as to the right of the plaintiffs to make the motion, but as to the power of the court to make the order setting aside the judgment as to both defendants. It is a question of jurisdiction only. The jurisdiction of the court is supported and sustained by the motion of defendant Mann. The relief granted is germane to the relief asked for, and was properly allowed, although irregularly entered.

It was proper for the plaintiffs to make the motion to have the defendant Smith included in the order setting aside the judgment as to the defendant Mann, and the court had jurisdiction to amend the order setting aside the previous judgment so as to include both defendants, and this is just what the court did in effect do.

Argument for Respondents.

In *Van Renselear v. Whiting, et al.*, the plaintiff recovered judgment in an action of assumpsit against John L. Whiting and J. Tallman Whiting upon a joint obligation. The circuit court, upon the motion of J. Tallman Whiting, ordered that "the judgment heretofore entered in this cause be and the same is hereby set aside and vacated as to the defendant J. Tallman Whiting." No motion was made to have the other defendant included in the order, and no other order was made. On appeal the supreme court said: "The effect of vacating the judgment as to J. Tallman Whiting was to vacate it as to the other defendant also." (12 Mich. 451.) The court had jurisdiction to set aside the judgment as to both defendants. (*Lewis v. Rigney et al.*, 21 Cal. 272.)

The judgment of the district court is affirmed.

LEONARD, J., having been of counsel in the court below, did not participate in the foregoing decision.

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[No. 850.]

LOUIS SOLOMON ET AL., RESPONDENTS, v. M. FULLER
ET AL., APPELLANTS.

APPEAL DISMISSED WHEN NOT TAKEN IN TIME.—If an appeal from the judgment is not taken within one year (1 Comp. Laws, 1391) it will be dismissed.

STATEMENT ON NEW TRIAL—WHEN STRICKEN OUT.—A statement which is not authenticated as required by statute, constitutes no part of the record of the case on appeal, and upon motion will be stricken out.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts appear in the opinion.

A. B. Hunt and Bishop & Sabin, for Respondents on motion to dismiss.

I. The appeal from the judgment should be dismissed. It was not taken in time. (Comp. Laws Nev., secs. 1388-1391; *Waggenheim v. Hook*, 35 Cal. 216; *Bornheimer v. Buld-*

win, 42 Id. 27; 36 Id. 671; *McCourtney v. Fortune*, 42 Id. 387; *Wetherbee v. Dunn*, 36 Id. 249.)

II. The statement in the record should be stricken out. It is not authenticated as required by statute. (Comp. Laws Nev., secs. 1258, 1394-96; *White v. White*, 6 Nev. 20; *Dean v. Prichard*, 9 Id. 332; *Cosgrove v. Johnston*, 30 Cal. 509; *Waggenheim v. Hook*, 35 Id. 216; *Morris v. Celis*, 41 Id. 331.)

Geo. S. Sawyer, for Appellant.

The provisions of vol. 1, Comp. Laws, 1258, as to the authentication of statements on motion for new trials and other papers used upon the hearing of such motions is merely directory. (*Lockwood v. Marsh*, 3 Nev. 138; *Overman S. M. Co. v. American M. Co.*, 7 Nev. 312.)

II. Respondents appeared and argued the motion for a new trial. They cannot now object that the statement was not agreed to by them, or settled by the judge. (*Dickenson v. Horn*, 9 Cal. 207; *Williams v. Gregory*, 9 Id. 76; *Kidd v. Laird*, 15 Id. 161.)

By the Court, BEATTY, J.:

Plaintiffs recovered a judgment in this case on February 19, 1875. On January 20, 1877, the motion of the defendants for a new trial was overruled, and at the same time an order was made by the district court amending the judgment so as to make it run in favor of Louis Solomon, surviving partner of Solomon & Cardenas, instead of Louis Solomon and D. L. Deal, administrator of Cardenas.

On the twelfth of February, 1877, the defendants gave notice that they would appeal from the judgment, from the order overruling their motion for a new trial, and from the order amending the judgment.

The respondents now move to dismiss the appeal from the judgment, on the ground that it was not taken until more than a year after the judgment was rendered. They also move to strike from the record what purports to be a statement on motion for new trial, upon the ground that it is not authenticated in any way; and if this motion prevails

Opinion of the Court—Beatty, J.

they ask that the entire appeal may be dismissed as having nothing to sustain it.

The motion to dismiss the appeal from the judgment must prevail, upon the ground that it was not taken in time. (C. L., 1391; *Bornheimer v. Baldwin*, 42 Cal. 31.)

The motion to strike out the statement must also prevail. It is not authenticated in any manner whatever, and, although it is true that the indorsements made by the judge on the affidavits used in support of the motion show that "a statement and amendments proposed thereto were read and referred to on the hearing," there is nothing to show that any statement was ever settled or allowed. If the statement which is contained in this transcript is the statement read and referred to on the hearing (and we do not know that it is), it is still not such a statement as we can regard, because it appears that amendments were proposed to it, and it has never been settled.

But, although the motion to strike out must be sustained, it does not follow that the appeals from the orders must be dismissed. They were taken in time, and it may be that the affidavits in support of the motion for a new trial, or the record of the judgment and order amending it, show some error of the district court.

The case has not been submitted, except so far as the motions to strike out and dismiss are concerned, and we cannot undertake now to decide whether the orders were or were not erroneous.

It is ordered that the appeal from the judgment be dismissed; that the statement be stricken from the record; and that the case be set down for argument on the appeals from the order denying a new trial, and from the order amending the judgment.

[No. 841.]

CRANE, HASTINGS & CO., APPELLANTS, v.
D. GLOSTER, RESPONDENT.

SECTION 379 CIVIL PRACTICE ACT CONSTRUED—SURVIVING PARTNERS NOT THE REPRESENTATIVES OF A DECEASED PERSON.—In construing the provisions of section 379 of the civil practice act: *Held*, that the defendant Gloster was properly allowed to testify in his own behalf against the plaintiffs, who are the surviving partners of J. J. Hayes, deceased, to a contract made with Hayes previous to his death; that the plaintiffs, as surviving partners of said Hayes, are not the “representatives of a deceased person.”

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

William Cain, for Appellants.

The testimony of defendant in his own behalf was inadmissible, the plaintiffs being the representatives of a deceased person. (*Davis v. Davis*, 26 Cal. 34; *Kishing v. Shaw*, 33 Cal. 446; *Satterlee v. Bliss*, 36 Cal. 512; 1 Comp. Laws, sec. 1440; *Roney v. Buckland*, 4 Nev. 45.)

Boardman & Varian, for Respondent.

By the Court, BEATTY, J.:

The plaintiffs are surviving partners of one J. J. Hayes, and sue in that character. The defendant pleaded a counterclaim, and on the trial in the district court was permitted, against the objection of the plaintiffs, to testify that Hayes, during his life-time, had employed him as traveling salesman for the firm at a salary of two hundred dollars a month, besides a commission on such goods as he might sell. According to his testimony, the firm became indebted to him for three months' services in a sum considerably exceeding the amount collected by him on account of his sales. The suit was brought to recover the money so collected, but defendant obtained a judgment for two hundred and twenty-five dollars, being the balance due him, according to his

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Opinion of the Court—Beatty, J.

testimony, under the contract with Hayes, over and above the amount of his collections.

The plaintiffs, appealing from the judgment and order overruling their motion for a new trial, contend that it was error to allow the defendant to testify in his own behalf. If, as surviving partners, they are the "representatives of a deceased person," within the meaning of section 379 of the civil practice act, the ruling of the district court was erroneous, otherwise it was not.

Under section 340 of the old practice act (Stats. 1864, p. 77) the testimony would have been excluded upon the ground that Hayes—the other party to the transaction—who could have testified to it if living, was dead. The case of *Roney v. Buckland* (4 Nev. 58) was precisely like this. Buckland was surviving partner for Bethel, and it was held to have been error to allow the plaintiff to testify to a transaction with Bethel. The decision in that case, however, was based entirely upon that clause of the old act which excluded the testimony of an interested party when the adverse party was dead—the words "adverse party" being construed to mean the other party to the transaction to be proved. It was not without some hesitation and criticism of the obscurity of the terms of the statute that the court reached its conclusion, but we are satisfied that the decision was correct, and that the rule it established was just and equitable. If the statute had not been changed we should have no hesitation in following that case; but unfortunately the law has been changed, and changed materially, by the adoption of the new practice act. (See sec. 376–7–8–9.) Section 379 contains the exceptions to the general rule prescribed in section 377, under which parties are allowed to testify in their own behalf. It would seem that the person who drafted that section had the decision in *Roney v. Buckland* in his mind, for the words "adverse party" of the old law were replaced by the more apt expression "other party to the transaction," but the words "is dead," that should have followed, were omitted. This omission was probably unintended, but we are satisfied that we cannot restore the missing words. The legislature in revising the law left them out,

and we are bound to presume that it was done *ex industria*, for the purpose of effecting the change which is effected in the law by their omission. We may be morally satisfied that the law as enacted defeats the legislative will; but we have no power to change the law, and in construing it we cannot go upon a surmise that the intention was to say something that has not been said. Assuming, then, that the words "is dead" were omitted in the revision of the law, not by mistake, but purposely, it cannot be maintained that they were left out simply for the reason that they were superfluous and unmeaning. The decision in *Roney v. Buckland* shows that they had a very important meaning, and a simple illustration will show that the principle of that decision is rejected and condemned by the present law. Under the old law if A, by his agent, contracted with B, and his agent died, in an action on the contract after the death of the agent, B. could not have testified because of the death of the "other party to the transaction," who, if living, could have testified to it. But under the present law it is clear that B. could testify unless it should be held that the principal in a contract is the "representative" of his deceased agent, and this, we suppose, would not be contended for.

It appears, then, that the old law recognized two reasons for excluding the testimony of a party interested, while the present law recognizes but one. Of the two principles of exclusion, the sounder and better has been rejected, and the more arbitrary and unreasonable retained. The result is, that our law on this subject is about as bad as it could be made. The policy of sealing the lips of the surviving party to any transaction, when the opposite party, whether principal or agent, is dead, is sanctioned and approved by the statutes of several of the states, and by numerous decided cases, while, on the other hand, the principle of arbitrarily excluding the testimony of a party whenever the opposite party to the action is the representative of a deceased person, has been as pointedly condemned. It has been shown, for instance, that there is no good reason for such exclusion when the deceased person contracted through agents who

Opinion of the Court—Beatty, J.

are living and can testify, and when he, if living, could not have testified to the transaction. In several of the states, the rule has been essentially qualified with reference to considerations such as this. We, however, have retained this rule in its most arbitrary form, and have abolished altogether the other rule which invariably operated to the promotion of justice. The rule so abolished exactly covered this case. The reason why the defendant should not have been allowed to testify, was that Hayes, the other party to the transaction, was dead—his lips were sealed. If the defendant testified falsely, he could not be contradicted. It was a good reason why he should not have been allowed to testify, but it is a reason which the legislature has condemned and repudiated. It is no longer the law in this state that a party is excluded from testifying in his own behalf because the agent through whom his adversary contracted is dead. In this case, Hayes was the agent contracting for the firm, and there is not a whit more reason why Gloster should not have been allowed to testify than there would be in the case above supposed, where A. is sued by B. on a contract made through his agent, and in which it must be conceded B. could testify, notwithstanding the death of A.'s agent and sole witness.

But it is claimed that the surviving partners are, within the meaning of section 379, the representatives of a deceased person, and that Gloster's testimony should have been excluded for that reason. In a certain sense a surviving partner suing in that character does represent his deceased partner. He represents the firm which was dissolved by the death of the deceased partner, and as the interests of the firm embrace the interests of the deceased, the survivor is indirectly his representative. But it is manifest that in the only sense in which surviving partners are representatives of a deceased partner they are his representatives not only as to transactions conducted by him during his life-time, but also, and to the same extent, as to transactions conducted by themselves. It would follow, therefore, on the construction contended for, that a surviving partner, suing or defending on a contract made by him-

self, could be a witness on his own behalf, at the same time that he could exclude the testimony of his adversary upon the ground that he represented his deceased partner.

This result would be as absurdly unjust as any that can be imagined and clearly proves that the law has been so loosely and improvidently framed that, however it may be interpreted, many cases must arise in which its operation will be grossly unfair. To hold that a surviving partner is not the representative of a deceased person leaves a door open to instances of injustice such as is presented by this case: to hold otherwise would open a door to more numerous cases of injustice of the same sort. We say more numerous because every deceased partner leaves one survivor at least and often (as in this case) several, so that naturally more litigated cases arise out of the transactions of surviving than of deceased partners. For this reason we are unwilling to say that a surviving partner is, within the meaning of the statute, the representative of a deceased partner. Such a construction would lead to more injustice than it would prevent; it would enlarge the operation of a rule which is already too sweeping and arbitrary, and at the same time it would leave a large class of cases of equal merit with this case, and equally demanding protection, wholly unprovided for. The reason, as above stated, why the defendant should not have been allowed to testify, is that the agent who contracted for the plaintiffs was dead. But this principle of exclusion has been eliminated from the law, and in all cases where the agent is not also a partner the injustice of this case might be repeated even if it were held that a surviving partner is within the meaning of the law. Still we might feel bound to give the law that construction if there was any precedent for such a decision; but we have found none that goes to that extent. The case of *Davis v. Davis* (26 Cal. 34) goes as far as any that we have found. It holds that the word "representative" as used in the California act was intended to designate not only the executor or administrator of a deceased person, but also the person or party "who succeeds to his right by purchase, descent or operation of law." We do not question the cor-

Argument for Appellant.

rectness of that decision, but it is not broad enough to cover this case. A surviving partner does not succeed to the right of his deceased partner. He has authority to wind up the affairs of the firm, but the share of the deceased partner goes to his heirs or personal representatives. The decision in the case of *Davis v. Davis* was that a grantee was the representative of his deceased grantor in an action to recover the granted premises. We think the decision was correct, and we find no fault with the principle upon which it was based. We only say that this case does not come within the principle. The following cases are more nearly in point, and tend to support our conclusion: 44 Barb. 456; 44 N. Y. 56; 8 West Va. 245.

The other errors assigned by appellants may be very briefly disposed of. The findings are sustained by the defendant's testimony, and the statute of limitations did not run against the counter-claim upon which he recovered on account of the absence of the plaintiffs from the state.

The judgment and order appealed from are affirmed.

[No. 889.]

EDWIN A. VESEY, ADMINISTRATOR OF THE ESTATE OF H.
M. VESEY, DECEASED, RESPONDENT, v. J. M. BENTON,
APPELLANT.

COMPETENCY OF WITNESSES—SECTION 379 CIVIL PRACTICE ACT CONSTRUED.—

Where the administrator of a deceased person is plaintiff, and testifies to a contract made by the deceased person with the defendant in his presence: *Held*, that under the provisions of section 379 of the civil practice act, Stat. 1877, 160, the defendant could not testify in his own behalf. This provision of the statute criticised.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

R. M. Clarke, for Appellant.

The court erred in excluding the testimony of the defendant. He was a competent witness. (Stat. 1877, sec. 1; *Roney v. Buckland*, 4 Nev. 45.)

Opinion of the Court—Hawley, C. J.

John R. Kittrell, also for Appellant.

Thomas E. Hayden, for Respondent.

By the Court, HAWLEY, C. J.:

The plaintiff, E. A. Vesey, testified in the court below, that as the agent of H. M. Vesey, deceased, during his lifetime, he made an agreement with the defendant to the effect that H. M. Vesey should board and lodge certain persons who were in the employ of defendant, for a certain price, which defendant agreed to pay.

The defendant offered himself as a witness in his own behalf to contradict the statements of the witness Vesey, but the court, upon the objection of plaintiff, excluded him from testifying.

This action of the court is sustained by the provisions of section 379 of the civil practice act: "No person shall be allowed to testify * * * when the other party to the transaction, or opposite party in the action, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person." (1 Comp. Laws, 1440.)

In this case the facts to be proved "transpired before the death" of H. M. Vesey. The "other party to the transaction" is E. A. Vesey, and he is "the representative of a deceased person."

The language of the statute, when applied to the facts of this case, is too plain to leave any room for construction.

It seems proper, however, in view of the results reached in *Crane, Hastings & Co. v. Gloster*, ante, and in this case to call the attention of the legislature to the crude and unsatisfactory provisions of the statute referred to.

The only object of incorporating any provision of exclusion is to prevent fraud and injustice.

The principle that ought to have been embodied in the law is that while a party may give evidence in his own behalf he shall not speak of the transactions and declarations of the opposite party, who is deceased. Death having

Points decided.

sealed the lips of one, the law ought to seal the lips of the other.

For obvious reasons it would not be proper to allow a party to testify against the representatives of a deceased person in respect to transactions had personally between the deceased person and the witness; but there is no valid reason for the adoption of a rule excluding a witness from testifying to a transaction had personally with the representative of the deceased person. In such a case the testimony of both the actors could and ought to be received and contrasted together for the purpose of ascertaining the truth.

As the law now stands, the district court was compelled, in *Crane, Hastings & Co. v. Gloster*, to allow the defendant to testify to a transaction had personally with a deceased member of the copartnership, because the survivors were not "the representatives of a deceased person." In this case the court was, by the express letter of the statute, compelled to reject the testimony of the defendant, notwithstanding the fact that the transaction testified to occurred with a person still living who was able to testify, and actually did testify, in the case, because such person was "the representative of a deceased person." Thus, as will readily be seen, giving to the defendant in the former, and the plaintiff in the latter case, an undue and unfair advantage.

A statute that leads to such results is repugnant to every sense of justice and of right, and ought to be amended.

Our duty, however, ends with deciding what the law is, and it must be left with the legislature to make it what it ought to be.

The judgment of the district court is affirmed.

[No. 880.]

L. W. GREENWELL, APPELLANT, v. RICHARD NASH,
RESPONDENT.

SALE OF PERSONAL PROPERTY, WHEN VOID—FRAUDULENT INTENT—KNOWLEDGE OF VENDEE.—When a sale of personal property is made by the vendor with the intent to hinder, delay and defraud his creditors, and the purchaser has knowledge of such intention, the sale is void.

Opinion of the Court—Hawley, C. J.

IDEM.—In determining the question whether the vendee had knowledge of the fraudulent intent of the vendor, the jury should take into consideration the acts and declarations of the respective parties, and all the facts and circumstances surrounding the sale, and if the knowledge of the purchaser is sufficient to put him upon inquiry, then the jury would have the right to infer knowledge upon his part of the fraudulent character of the transaction.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

A rehearing was granted in this case. Pending the rehearing, the case was settled and dismissed. The opinion as here published does not contain any portion of the decision of the court touching the questions upon which the rehearing was granted.

George P. Harding, for Appellant.

The instruction given by the court was erroneous. (*Hessing v. McClosky*, 37 Ill. 352; *Mayor & Co. v. Trimble*, 25 Md. 34; *State v. Clara*, 8 Jones L. 27; *Swank v. Adm'rs*, 24 Ind. 201; *State v. Harrison*, 5 Jones, N. C. 121; *Watkins v. Wallace*, 19 Mich. 77; Article 6, sec. 12, Const. Nevada; 51 Cal. 589.)

M. S. Bonnifield and Wells & Stewart, for Respondent.

By the Court, HAWLEY, C. J.:

The plaintiff, Greenwell, purchased from J. J. Mann certain personal property belonging to the copartnership of Smith & Mann. This property was afterwards levied upon and taken by the defendant, Nash, sheriff of Humboldt county, as the property of Smith & Mann, under and by virtue of a writ of execution issued upon the judgment obtained by Stevenson & Son against Smith & Mann. Plaintiff, claiming to be the owner of the property, brought this suit to recover its value.

Did the court err in giving the following instruction? "If you find from the evidence that the acts of said Mann in relation to the alleged sale of said property to plaintiff were fraudulent as to the creditors of Smith & Mann, and (that) they were sufficient to put an ordinarily intelligent

Opinion of the Court—Hawley, C. J.

man on his guard. In other words, if you find from the evidence that his acts were fraudulent as to such creditors and (were) such as to arouse suspicions of a fraudulent intent on his part in the mind of a man of ordinary mental capacity, then I charge you that it was the duty of plaintiff to satisfy himself of the integrity of the transaction on the part of Mann before making any purchase, and that if he failed to do so you may reasonably presume that he participated in the fraud of Mann."

As an abstract legal proposition this instruction is erroneous in assuming, as it does, that plaintiff Greenwell had notice of the fraudulent acts of Mann. The evidence was sufficient to authorize the giving of a proper instruction on this point.

It is well settled, in actions of this character, that whenever the evidence shows that a sale is made by the vendor with the intent to hinder, delay and defraud creditors, to a purchaser having knowledge of such intent, the sale is void.

The knowledge to be brought home to the purchaser need not be actual, positive information or notice. The jury may, in order to determine whether the purchaser had knowledge of the fraudulent intent of the vendor, take into consideration the acts and declarations of the respective parties and all the facts and circumstances surrounding the sale (*Thomas v. Sullivan*, ante; *Craig's Administrator's Appeals*, 77 Penn. St. 448), and if the knowledge of the purchaser, from the evidence thus presented, is sufficient to put him upon inquiry, then the jury would have the right to infer that he had knowledge of the fraudulent character of the transaction. (*Humphries v. Freeman*, 22 Tex. 45; *Atwood v. Impson*, 20 N. J. Ch. 151; *Strauss v. Kranert*, 56 Ill. 254; *Ringgold v. Waggoner*, 14 Ark. 69.) This rule is applied even in cases where the proofs show that the purchaser has paid a full consideration for the property. (*Green v. Tantum*, 19 N. J. Eq. 105; *Tantum v. Green*, 21 N. J. Eq. 364; *Wright v. Brandis*, 1 Carter, Ind. 336; *Stoval v. The Farmers' and Merchants' Bank of Memphis*, 8 S. & M. 306.

LEONARD, J., having been of counsel in the court below, did not participate in the foregoing decision.

Argument for Appellant.

[No. 887.]

STATE OF NEVADA, RESPONDENT, v. THE CALIFORNIA MINING COMPANY ET AL., APPELLANTS.

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SUIT FOR DELINQUENT TAXES AND PENALTIES—SAME CAUSE OF ACTION—

WHEN MAY BE SEVERED.—The complaint in this action shows that an action was commenced by the state to recover the delinquent taxes and penalties due on the proceeds of defendant's mine, and thereafter, while said suit was pending and undetermined, the plaintiff, at the instance and by the consent of the defendant, in open court withdrew from the consideration of the court the question of plaintiff's right to recover the penalties in addition to said tax, without prejudice to plaintiff's right to bring an action for said penalties; that thereafter plaintiff brought this suit to recover said penalties: *Held*, upon a demurrer to said complaint, that this action might, although a part of the same cause of action, under the special facts alleged, be maintained for the penalties.

IDEM—WITHDRAWAL OF PENALTIES NOT A DISMISSAL OF THE ACTION.—*Held*, that the complaint in this action does not show that the former action was dismissed, and that the demurrer upon the ground that there is another action pending for the same cause of action is well taken.

IDEM—PERCENTAGE OF DISTRICT ATTORNEY.—*Held*, that the district attorney is entitled to five per cent. on the tax and penalty.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

C. J. Hillyer, for Appellant.

I. The complaint shows that another action is pending between the same parties for the same cause of action. The demurrer was therefore properly sustained. (Pr. Act, sec. 40; Rev. Act, sec. 36; *Barnett v. Kilbourne*, 3 Cal. 327; *Ewing v. McNairy*, 20 Ohio St. 318.

II. An entire cause of action cannot be made the subject of separate suits. (2 Smith's Leading Cases, 774; *Simes v. Zane*, 12 Harris, 242; *Logan v. Caffrey*, 30 Pa. 197.)

III. The cause of action for the tax and penalties was an entirety. A cause of action is entire when the demands immediately arise out of one and the same act or contract. The distinction, as well as the general rule as to when an action is entire, is illustrated in the following cases: *Bendernagle v. Cocks*, 19 Wend. 207; *Secor v. Sturgis*, 16 N. Y.

Argument for Respondent.

548; *Trask v. N. H. R. R.* 2 Allen, 331; *Goodrich v. Yale*, 8 Allen, 454; *Cunningham v. Harris*, 5 Cal. 81; *Wetmore v. San Francisco*, 44 Id. 294; *Simes v. Zane*, 12 Harris, 242; *Farrington v. Payne*, 15 Johns. 430-2; *Craycroft v. Cockran*, 16 Iowa, 302; *Corbett v. Evans*, 1 Casey, 310; *Ewing v. McNary et al.* 20 Ohio St. 318; *Gould v. Evansville*, 1 Otto, 532-3. The liability of defendants, both for tax and penalties, springs from one single act, to wit: the non-payment of the tax. The penalties are mere incidents of the tax.

IV. The tax suit authorized by the statute is a civil action, and not a special proceeding; the pleadings are to be tested by the same rules. The effect of judgments in such suits is the same as in ordinary civil actions. (Revenue Act, sec. 36; 2 Comp. L., p. 196; *Mayo v. Ah Loy*, 32 Cal. 477; *Eitel v. Foote*, 39 Id. 439; *Conley v. Chedic*, 7 Nev. 336; *State v. C. P. R. R. Co.*, 9 Id. 88; 4 Id. 350; 3 Id. 174; 1 Id. 394.)

V. The complaint shows that an action is still pending as well for these penalties as for the tax. It is the first suit that bars or abates the second, and not the second which bar or abates the first. (*Saunders v. Winship*, 5 Pick. 275; *Agnew v. McElroy*, 10 S. & M. 552; *Barnum v. Reynolds*, 38 Cal. 645; *Aurora City v. West*, 7 Wall. 102.)

VI. The averments of the complaint show nothing more than a permission to plaintiff to dismiss as to a portion of his complaint. Such a dismissal is as much a bar to the future litigation as a judgment directly upon its merits. (*Logan v. Caffrey*, 30 Pa. 197; Practice Act, sec. 151; *Borrowscale v. Tuttle*, 5 Allen, 377; *Foot v. Gibbs*, 1 Gray, 412.)

F. V. Drake, District Attorney of Storey County, for Respondent.

I. The complaint states a good cause of action; it does not show upon its face that the matters involved in the present suit have been passed upon or determined by a court having jurisdiction. Nor does it appear that the court has exercised its judicial mind upon the subject of plaintiff's right to recover the penalties. (Freeman on Judgments, secs. 250 to 255, 257-61; Bigelow on Estoppel,

Argument for Respondent.

pp. 17, 18, 96, 97, 98; *Jenkins v. Robertson*, Law Rep. 1, H. & L.; Scotch, 117, Scotch and Divorce Appeal Cases.) A dismissal "without prejudice" is universally held to avoid a bar to a second action. (*Perine v. Dunn*, 4 John's Ch. 142; *Neafie v. Neafie*, 7 Id. 1; *Foot v. Gibbs*, 1 Gray, 412; *Parrish v. Ferris*, 2 Black, U. S. 606; *Durant v. Essex Co.*, 7 Wallace, 107; *Knox v. Walldoborough*, 5 Greenl. 185; *Hull v. Blake*, 13 Mass. 153; *Sweigart v. Frey*, 8 Serg. & Rawle, 299, 305.)

II. If the cause of action in the first suit was an entirety at the time suit was brought, still it was capable of divisibility by consent, for plaintiff might have obtained judgment for the original taxes and failed to recover the penalties. (1 Greenl. Ev. (Redfield's ed.), sec. 532; *Lawrence v. Hunt*, 10 Wend. 81; *Gray v. Dougherty*, 25 Cal. 266; *McCreary v. Casey*, 45 Id. 130; *Hough v. Waters*, 30 Id. 309; *Earll v. Bull*, 15 Id. 421; *Miller v. Manice*, 6 Hill, 114; *Burwell v. Knight*, 51 Barb. 267; *Rosse v. Rust*, 4 Johns. Ch. 300; *Van Vleet v. Olin*, 1 Nev. 495; *Sherman v. Dilley*, 3 Id. 21; *Emmons v. Dowe*, 2 Wis. (Ville's B. Notes), 259; *Etheridge v. Osborn*, 12 Wend. 399; *Goddard v. Selden*, 7 Conn. 521; *State v. Rusk*, 23 Wis. 640; *Hughes v. United States*, 4 Wallace, 237; *Putnam v. New Albany*, 4 Biss. 365; *Starr v. Stark*, 2 Sawyer R. (9th Circ.), 615.)

III. The defendant will not be allowed to plead as a bar, circumstances or facts occasioned by his own conduct. (*Clark v. Young*, 1 Cranch, (U. S.) 181; *Secor v. Sturgis*, 16 N. Y. 548.)

IV. No one has power to relieve the defendants of payment or to dissolve the lien of the statute for the taxes. (2 Comp. Laws. 3156, 3238, 3250, and provisions of Revenue Laws; *State v. W. U. T. Co.*, 4 Nev. 345; *State v. C. P. R. Co.*, 9 Id. 79; *State v. Easterbrook*, 3 Id. 173; *State v. Ormsby Co.*, 6 Id. 95; *State v. Com. Washoe Co.*, 7 Id. 83; *State v. C. P. R. R. Co.*, 10 Id. 47; *State v. C. P. R. R. Co.*, 10 Id. 87; *State v. Gracey*, 11 Id. 223. Estoppel does not run against the State. (*Taylor v. Shufford*, 4 Hawks. 116; *Candler v. Lunsford*, 4 Dev. and Bat. 408; *Wallace v. Maxwell*, 10 Ired. 110; *State v. Graham*, 23 La.

Opinion of the Court—Beatty, J.

Ann. 402; *People v. Brown*, 67 Ill. 435; *Crane v. Reeder*, 25 Mich. 303.)

By the Court, BEATTY, J.:

In this case a demurrer to the complaint was overruled, and the defendants, failing to answer within the time allowed, their default was entered and a judgment rendered in favor of the plaintiff. The defendants appeal from the judgment, assigning as error the order of the district court overruling their demurrer.

The complaint shows that the taxes on the proceeds of the corporation defendants' mine for the quarter ending December, 1876, became delinquent, and that in April, 1877, an action was commenced in the district court to recover the taxes and the penalties that had accrued on account of the failure to pay them before delinquency; "that thereafter, to wit, on the fifth day of May, A. D. 1877, the said suit so commenced on the tenth day of April, A. D. 1877, was pending and undetermined in said district court; that on said fifth day of May, A. D. 1877, plaintiff, at the instance of defendants, the said California Mining Company, and by the consent of said defendants, in open court, withdrew from the consideration of said court the question of plaintiff's right to recover of and from defendants the said ten per centum additional to said tax for delinquency and the said twenty-five per centum in addition to said tax, penalty accrued upon the bringing of said suit; that said question of the plaintiff's right to recover of and from the defendants the amount of said delinquency and penalty were so withdrawn from the consideration of the court aforesaid without prejudice to plaintiff's right to sue for and recover of and from said defendants the said delinquency and penalty."

These are the only allegations of the complaint to which the grounds of demurrer here relied upon have particular reference. The second and third grounds of demurrer are thus stated: "2. The said complaint shows upon its face that there is another action pending between the same parties for the same cause. 3. The said complaint shows upon its face that the cause of action therein set forth has already been adjudicated and finally determined."

Counsel for defendant does not of course attempt to maintain the truth of both the propositions. His position is that the delinquent tax and the penalties for delinquency are one entire cause of action and not capable of being severed or split up into different causes of action; that if the complaint is considered to mean that the former suit was dismissed as to the penalties without prejudice, at the instance or with the consent of the defendants, and judgment recovered for the tax alone, that judgment is nevertheless a complete bar to this action; that it is a bar because a recovery of part of an entire cause of action is always a bar to a suit for the remainder, and that this rule is founded upon principles of public policy which place it beyond the power of the parties to vary it by consent. Upon the most favorable construction of the complaint, therefore, he claims that his demurrer ought to have been sustained; but he relies more especially upon the second ground of demurrer; that is, that it appears from the complaint that the former action for the penalties as well as the tax is still pending and undetermined, and that the penalties may yet be recovered therein. It is conceded by counsel for the State that the cause of action for the tax and the penalties is entire, and it is not denied that, as a general rule, the recovery of a part of an entire demand is a bar to a suit for the remainder; but it is contended that the only substantial reason for the rule is that no man ought to be twice vexed for the same cause, and that when the defendant has consented to a severance of the demand, the reason of the rule failing, the rule itself fails. To this counsel for appellants replies that the rule is founded not only upon the maxim *nemo debet bis vexari*, etc., but also and principally upon another maxim, *interest reipublica ut sit finis litium*, and consequently that it cannot be varied by consent of parties. We have been referred to a large number of cases in which it has been held that the action was barred by a former adjudication upon part of the same entire demand, but the question did not arise, and consequently was not decided, in any one of them whether the operation of the rule would be affected by the agreement of the party to be charged that the de-

Opinion of the Court—Beatty, J.

mand against him might be split. Wherever a reason has been assigned for the enforcement of the rule invariable reference has been made to the injustice of permitting a party to be harassed by numerous suits upon the same obligation; whereas in only two cases that we remember (*Sime v. Zane*, 12 Harris, 242, and *Logan v. Caffrey*, 30 Pa. St., 197) was any allusion made to the interest of the public, and in those cases it was not decided, and could not be decided, since the question was not presented, that the interest of the public was in itself a sufficient reason for an inflexible adherence to the rule in all cases. We are satisfied that the principal, if not the only substantial, reason for the rule is the right of the debtor to be protected from harassing litigation, and that where he consents to the dismissal of a part of an entire cause of action without prejudice a subsequent action therefor ought not to be barred. The interest of the public is just as little concerned in prohibiting such an arrangement, which it must be presumed will always be founded upon some anticipated advantage to the debtor, as it is in preventing a debtor from making himself liable to a multiplicity of suits by accepting his creditor's orders in favor of third persons for portions of the amount of his indebtedness.

Moreover, if the only foundation of the rule was the interest of the public that there should be an end of litigation, it might be said in this case that although it is against the interests of the state that private parties should be permitted to split up entire causes of action, this is a reason that cannot be invoked against the state itself. If it happens to be to the advantage of the state to bring a second suit for these penalties, she cannot be prohibited from doing so upon the ground that it is against her interest that private citizens should be permitted at their option to do the like. It is our opinion that if the action as to the penalties was dismissed at the instance or by the consent of the defendant corporation, without prejudice, this action may be maintained as to the twenty-five per cent. penalty. We have recently held (see case of same title as this, No. 853, decided at this term) that the ten per cent. penalty does

Opinion of the Court—Beatty, J.

not accrue upon a delinquent tax on mining proceeds. But we agree with counsel for the appellants that the allegations of the complaint are not sufficient to show that the action was so dismissed.

The sum and substance of the allegation upon this point is, that the question of the right of the state to recover the penalties was withdrawn from the consideration of the court. This is not equivalent to an allegation that the cause of action for the penalties was dismissed. The question of the right of the state to recover the penalties is purely a question of law, and neither the district attorney nor any other representative of the state had any power to absolve the district court from the duty of deciding it in an action which involved the penalties. If, without dismissing the action as to the penalties, the court was asked to ignore the state's right to recover them, it was asked to commit an error for which its judgment might have been reversed on appeal, notwithstanding the unauthorized consent of the district attorney. We cannot hold upon the allegations of the complaint that the action as to the penalties has been dismissed, and we think the district court erred in not sustaining the demurrer, on the ground that the complaint shows another action still pending between the parties for the same cause.

We do not wish to be understood as intimating that the district attorney or any one else had any authority to consent to a dismissal of the action as to the penalties. We are quite of a contrary opinion, but we think it is clear that if the district court permitted a dismissal as to the penalties, at the instance or by the consent of the defendant corporation, and without prejudice, the state ought to have some remedy, and if it has none more effective it ought to prevail in this action, upon a proper showing of the facts.

There seems to have been a miscalculation of the amount due the district attorney in this case. He is entitled to five per cent., as we held in case No. 853, on the tax, and twenty-five per cent. penalty. Here he was allowed nearly ten per cent. of the amount remaining delinquent. This

Points decided.

error will be corrected in any judgment that may be hereafter rendered in favor of the state.

The judgment is reversed and the cause remanded. The district court will enter an order sustaining the demurrer, with leave to the plaintiff to amend the complaint.

[No. 888.]

STATE OF NEVADA, RESPONDENT, v. CONSOLIDATED VIRGINIA MINING COMPANY ET AL., APPELLANTS.

(Judgment reversed upon the authority of *The State v. California M. Co.*, No. 887, ante, 289.)

By the Court, BEATTY, J.:

This case is precisely like the preceding case (*State v. California Mining Company*, No. 887), and was submitted upon the same argument.

On the authority of that case the judgment herein is reversed and the cause remanded with directions to the district court to enter an order sustaining the demurrer of the defendants, with leave to the plaintiff to amend its complaint.

[No. 866.]

LAVEAGA AND HAWLEY, RESPONDENTS, v. WISE AND LEVY, APPELLANTS.

AGREED STATEMENT OF FACTS TAKE THE PLACE OF FINDINGS.—When the statement and recitals in the judgment show that there was no trial of any issue of fact, that no findings of fact were filed, and that the facts were settled by stipulation: *Held*, that the pleadings and stipulation stand in the place of the findings, and authorize the court to consider the question whether or not the judgment is supported by the facts agreed upon.

UNDERTAKING TO PREVENT THE LEVY OF ATTACHMENT—WHEN SURETIES ARE NOT LIABLE.—When sureties, not knowing that a writ of attachment has been levied upon the property of the defendant in an attachment suit, execute an undertaking to prevent the levy of an attachment, and the property that had been previously levied upon is subsequently released from the attachment: *Held*, in an action against the sureties, that their promise was only to prevent a levy of the writ of attachment, and that they could not be held liable for the release of the property after the attachment had been levied.

Argument for Respondents.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts appear in the opinion.

Grass & Harding, for Appellants.

I. The parties settled all the issues of fact upon the pleadings by stipulation. (*Swift v. Muylgridge*, 8 Cal. 445; *Fox v. Fox*, 25 Id. 587; *Taylor v. Palmer*, 31 Id. 242; *Burnett v. Stearns*, 33 Id. 468; *Virgin v. Brubaker*, 4 Nev. 31; *Brown v. Tolles*, 7 Cal. 399; *Cooper v. Pac. M. Life Ins. Co.* 7 Nev. 116.)

II. The averment in the answer that the plaintiffs had never kept, nor had the defendants broken, the covenants in the undertaking by which they were respectively bound, was a good plea as a substantial denial of the breach assigned. (*Miller v. Elliott*, 1 Smith, 267; *Musgrave v. Muscatine County*, 1 Iowa, 446.) The conditions of the undertakings have never been complied with by plaintiffs nor broken by appellants. It does not appear that any property was released, or any attachment discharged, or prevented, or waived, on account of, or in consequence of, or in consideration of, the execution or delivery of the undertaking.

A. W. Fisk, for Respondents.

The only condition attached to the undertaking given by appellants is as to the rendition of judgment in favor of the plaintiffs against the Jersey Mining and Smelting Company. After the rendering of such judgment, nothing further was necessary to make the appellants liable upon said undertaking. (*Bowers v. Beck*, 2 Nev. 151—opinion of Beatty, J.) The bond was given for the benefit of the plaintiff. (29 Cal. 194.) The consideration or condition which supports the principal contract will support that of the sureties. (*McCarthy v. Beach*, 10 Cal. 461; *Robertson v. Findley*, 31 Mo. 384; 7 Wait's Actions and Defense.) If the benefit derived from giving the bond is accepted, it is immaterial whether it was asked for or not. (1 Par. on Cont. 469, note *a*, and 474.)

Opinion of the Court—Beatty, J.

The giving of the undertaking as security for any judgment that might be rendered in favor of respondents and against the Jersey M. & S. Co. estops the appellant from denying it. (*Kelly v. McCormick*, 28 N. Y. 320.) The undertaking as given was a substitute for the property of the defendant. (Drake on Attachment, sec. 339.) The court can only consider the judgment-roll in this case. The findings are not made a part of appellant's statement. (*Ellis v. C. P. R. R. Co.*, 5 Nev. 252; *Richards v. Howard*, 2 Id. 128; *Corbett v. Job et al.*, 5 Id. 201.)

Wells & Stewart, also for Respondents.

The undertaking, if not good as a statutory undertaking, is good at common law. (*Canfield v. Bates*, 13 Cal. 606; *Curia v. Puckard*, 29 Id. 194.)

By the Court, BEATTY, J.:

The statement shows that this case was submitted to the district court upon agreed facts. Plaintiffs had judgment, and the defendants appeal therefrom on the sole ground that it is not supported by the facts as agreed upon.

The respondents present two objections to any consideration of the points relied on by the appellants. It is said: 1. There was no motion for a new trial, and it is now too late to claim that the decision is contrary to the evidence; 2. It cannot be objected that the findings of the district judge fail to support the judgment because the findings are not made part of the statement and consequently are no part of the record before us.

In answer to the first objection it is enough to say that the appellants are not claiming that any fact was found against the evidence. The statement, as well as the recitals in the judgment, shows that there was no trial of any issue of fact; the facts were settled by stipulation in writing between the parties and no evidence was introduced.

As to the second objection, it does not appear that any findings of fact were filed. The recital in the judgment is that the court after deliberation delivered its finding and decision in writing, but this does not necessarily imply that

Opinion of the Court—Beatty, J.

there were any findings of fact. Certainly none were required, and it cannot be inferred from the judgment nor presumed, in the face of the statement, that any facts were found by the court other than those admitted by the pleadings and embraced in the stipulation of the parties. The pleadings and stipulation therefore stand in the place of findings and contain everything essential to a review of the judgment upon the assignments of error contained in the statement.

Coming to the merits of the case, the facts are as follows: July 5, 1876, Laveaga & Hawley, the plaintiffs in this action, had a suit pending against the Jersey Mining and Smelting Company, and caused an attachment to issue therein. July 7 the company appeared in the action and applied for a discharge of the attachment, which had already been levied on all or nearly all of its property. The defendants in this action, not knowing that the writ had been executed, and for the sole object and purpose of preventing a levy, delivered to the plaintiffs the following undertaking:

“In District Court, Fourth Judicial District, Nevada—*Laveaga & Hawley v. The Jersey Mining and Smelting Company*.—Whereas, the above-named plaintiffs have commenced an action in the aforesaid court against the above-named defendant; * * * and, whereas, an attachment has been issued, directed to Richard Nash, * * * whereby he is commanded to attach and safely keep all the property of said defendant within his custody, not exempt from execution, * * * unless the defendant give him security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demand, besides costs, in which case to take such undertaking; and, whereas, the said defendant is desirous of giving the undertaking mentioned in said writ.

“Now, therefore, we, the undersigned, residents of the County of Humboldt, State of Nevada, in consideration of the premises and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of two thousand five hundred dollars, gold coin of the United States, and promise to the effect that if the said plaintiffs

Opinion of the Court—Beatty, J.

shall recover judgment in said action we will pay the said plaintiffs, upon demand, the amount of said judgment, together with costs, not to exceed in all the sum of two thousand five hundred dollars, gold coin of the United States.

“ALEXANDER WISE,
N. LEVY.”

“Dated July 7, 1876.

Thereupon the attachment was discharged, and on July 11, four days later, the property that had been attached was released by the sheriff.

Afterward the plaintiffs recovered judgment, no part of which has been paid, although demanded of the defendant, wherefore this suit is brought.

The defendants plead a total failure of consideration. They say, and the fact is admitted, that the sole object of their undertaking was to prevent a levy of the writ, and that they would never have made or signed or executed said undertaking if they had known that the writ had been or would be executed.

If they had contracted in consideration of a discharge of the attachment and a release of the property attached, it would have been no answer to the plaintiffs, after a release of the property, to say that they meant something else. But nothing can be plainer than the terms of the undertaking as to the consideration upon which they agreed to become bound for the debt of another. It recites that the defendant “is desirous of giving the undertaking mentioned in said writ,” and it is “in consideration of the premises and to prevent the levy of said attachment,” that they promise to pay any judgment that may be recovered by the plaintiffs. That consideration has totally failed. The attachment, it is true, was discharged, and the property was afterward released, but that was not what these sureties bargained for, and it was not a benefit accepted by them. It does not follow that a man who is willing to give a bond to prevent the levy of an attachment will be equally willing to give a bond to obtain the discharge of an attachment. The levy of the writ may make all the difference in the world in the solvency of the attachment debtor; it may break up his business; it may set other creditors in motion, and multiply costs and expenses indefinitely. In this case it is a con-

ceded fact that the defendants would not have executed the undertaking upon which they are sued if they had known that the writ had already been levied. They were not parties to the suit, and there is no presumption that they knew of the order discharging the attachment, or that it was made, if such is the fact, in consequence of their undertaking. The benefit of the order accrued to the smelting company, not to these defendants, and it cannot be said that they accepted it. It was not their undertaking, executed in pursuance of section 126 of the Civil Practice Act, that procured the order; but it was the error of the court, or of the plaintiffs, in making or consenting to the order without requiring an undertaking to be executed in consideration thereof in pursuance of sections 139 and 140. There is nothing in any of the opinions in *Bowers v. Beck*, 2 Nev. 139, to sustain the position of the respondents, that the only condition necessary to bind the sureties was the recovery of judgment by the plaintiffs in their suit against the smelting company. In that case there was no question of failure of consideration. The bond had been given to secure the release of property attached, and it had been released, and whatever was said in the opinions must be understood with reference to that fact. The language of the opinion which respondents rely upon to sustain them shows, at its close, that the author understood that the release of the property was just as essential to the liability of the sureties as a recovery of judgment against the defendant. "The only questions are, was the property released, and has a breach of the bond been shown." (2 Nev. 152, *ad fin.*) In a suit on such an undertaking as this the questions are, did the sheriff refrain from executing the writ by a levy, and has a breach of the bond been shown. Both must be affirmatively answered before the plaintiff can recover. In this case the first is answered in the negative, and the judgment of the district court was therefore erroneous.

Judgment reversed.

LEONARD, J., having been of counsel in the court below, did not participate in the foregoing decision.

Opinion of the Court—Hawley, C. J.

[No. 911.]

EX PARTE DENNIS TWOHIG AND CON. FITZGERALD.

HABEAS CORPUS—INQUIRY UPON.—A court is not authorized upon a writ of *habeas corpus* to inquire into the question of fact as to whether or not an indictment, regular upon its face, was ever found by the grand jury.

IDEM—JUDGMENT OF CONVICTION.—A judgment of conviction in the district court, regular upon its face, is conclusive until reversed, and cannot be reviewed upon *habeas corpus*.

APPLICATION for writ of *habeas corpus*.

The petition, among other things, alleged that Twohig and Fitzgerald were jointly tried “upon an indictment, regular upon its face, purporting to have been found by the grand jury of Nye county, for the crime of an assault with intent to kill,” committed upon the person of James Jones; that the said indictment was never found by the grand jury, and was presented to the court either by fraud or mistake; that after their trial and conviction, but before sentence, they were informed by seven of the grand jurors that no such indictment had been found against them. The report of the grand jury is attached to the petition, and among other things, shows as follows: “In the case of Denuis Twohig, charged with the crime of an assault with intent to kill, we find a true bill. In the case of Con. Fitzgerald, charged with the crime of an assault with intent to kill, we find a true bill.”

Attached to the petition was an affidavit of seven of the grand jurors, to the effect that the said report of the grand jury was correct; that no other indictments were found by said grand jury, and that the said grand jury “found no indictment wherein two persons were jointly indicted.”

The other facts sufficiently appear in the opinion.

W. N. Granger and William Woodburn, for Petitioners.

John R. Kittrell, Attorney-general, for the State.

By the Court, HAWLEY, C. J.:

The question sought to be raised by the petition, as to whether or not the indictment upon which Twohig and

Points decided.

Fitzgerald were tried and convicted was ever found by the grand jury of Nye county, cannot be inquired into by the writ of *habeas corpus*.

The return to the writ shows that defendants are held in custody by C. C. Batterman, warden of the state prison, upon regular commitments of conviction for the crime of an assault with a deadly weapon with intent to inflict bodily injury.

It appears from the petition, as well as from the return to the writ, that the indictment and judgment of conviction are regular upon their face.

This being true, it follows from the principles announced in *Ex parte Winston*, 9 Nev. 71, and the authorities there cited, that the judgment of conviction in the district court is conclusive until reversed. It cannot be reviewed upon *habeas corpus*. The principle is too well settled to require discussion.

The writ is dismissed, and the prisoners are remanded to the custody of the warden.

[No. 871.]

CHARLES D. SMITH ET AL., MINORS, BY WILLIAM H. SMITH, THEIR GUARDIAN, APPELLANTS, v. LOUISA SHRIEVES ET AL., RESPONDENTS.

HOMESTEAD LAW CONSTRUED—JOINT TENANCY.—In construing the homestead law of this state: *Held*, that when a declaration of homestead is filed, the property is held by the husband and wife as joint tenants, and that upon the death of either the homestead property vests absolutely in the survivor. (Beatty, J., dissenting.)

IDEM—WHEN NO DECLARATION IS FILED.—When no declaration has been filed upon the homestead property, no joint tenancy is created; in such case, if it was common property, one half vested in the wife upon the death of the husband, and the other half vested in the minor children of said deceased and his wife.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

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Argument for Appellants.

Whitman & Wood, for Appellants.

I. If appellant had any right of action, Harriet M. Smith was not a necessary party. (1 Comp. Laws, 1077.)

II. The present constitution and laws of Nevada, touching the matter at bar, are similar to the corresponding originals in California. (Const. Nev. art. 4, sec. 30; Comp. Laws, secs. 187-189, 602-609; Const. Cal. art. 11, sec. 15; Stats. Cal. 1851, p. 298, sec. 10, p. 463, secs. 121, 125; Wood's Digest, art. 2280-81, chap. 42, p. 483.) So, if there were any difficulty in the construction of the laws of Nevada, touching the subject in hand, which we deny, the court may be aided by the interpretation given by the supreme court of California. There, the construction for which we contend, that upon the death of a husband and father, the surviving wife and children take the homestead existing at the time of his death, or thereafter set apart by order of the probate court, as provided in sec. 607 Comp. Laws Nev. (*Wixom's Estate*, 35 Cal. 320; *Rich v. Tubbs*, 41 Id. 34.) It would seem, however, that there is, or should be, no difficulty in the construction of the statutes of this state, and that the natural and logical reading is in favor of our position.

The only stumbling-block is the phrase "joint tenants," occurring at the close of section 186, Comp. Laws, Nev. If this is to be taken in strict legal parlance, it must be admitted that the right of survivorship is a necessary element of such tenancy. And when technical words are used in a statute they are to be taken in a technical sense, unless it be evident, from surrounding context and the language of other statutes to be construed *in pari materia*, that such use was not intended. Also, having always regard to the legislative intent. (*Ormsby County v. State Nev.*, 6 Nev. 265; *Davis v. Cook*, 9 Id. 134; *State v. Rogers*, 10 Id. 320; *Odd Fell. Bank v. Quillen*, 11 Id. 109.)

Upon inspection of the homestead act (Comp. Laws, p. 60) it is evident that the phrase in question could not have been intended in its strict sense. As by the statute the homestead may be acquired by the act of either husband or

Argument for Respondents.

wife. (1 Comp. Laws, 186.) Once acquired, neither can alienate without the other. (1 Comp. Laws, 187.) Such is not a joint tenancy. (1 Washburn on Real Property, 643, sec. 5; p. 645, sec. 11; p. 647, sec. 17.)

R. M. Clark and Wells & Stewart, for Respondents.

I. The statute of Nevada approved March 7, 1865 (Stats. of Nev. 1864-5, 239), to define the rights of husband and wife, is *in pari materia*, and its provisions must be considered in connection with other statutes, in passing upon this case. The homestead property is not common property, for all common property, on dissolution of the community by the death of the husband, is equally subject to his debts, the family allowance, and the charges and expenses of administration. The homestead is not so subjected. (Stats. 1864-5, 240, sec. 11.)

II. The homestead, from and after filing the declaration for record, is held by the husband and wife as joint tenants. (1 Comp. Laws, 60, sec. 1.) Under the homestead act of California, passed in 1851, the supreme court of that state several times decided that the homestead was held in joint tenancy, with the right of survivorship, although the statute did not, in terms, provide that the property should be held by the husband and wife as joint tenants. (*Taylor v. Hargous*, 4 Cal. 268; *Poole v. Gerrard*, 6 Id. 71; *Rivalk v. Kramar*, 8 Id. 66.) These cases were overruled in *Gee v. Moore*, 14 Cal. 472. The legislature, in 1860, amended the homestead act, by providing for the selection of a homestead, and that thereafter the husband and wife should be deemed to hold said homestead as joint tenants. This statute came before the court several times for interpretation, and was uniformly held to create a joint tenancy, with right of survivorship. (*McQuade v. Whaley*, 31 Cal. 526; *In re Est. of James*, 23 Id. 416; *Barber v. Babel*, 36 Id. 11.) The statute of Nevada of March 6, 1865, to exempt the homestead from forced sale, is an exact copy of the California homestead act of 1860, and was adopted after the California act had been there construed to create a joint tenancy, with right of survivorship, and must, therefore, be held to adopt,

Opinion of the Court—Leonard, J.

here, the construction it had received there prior to its passage. (*Ash v. Parkinson*, 5 Nev. 15; *Hess v. Pegg*, 7 Id. 29; *People v. Coleman*, 4 Cal. 46; *Cooley Const. Lim.* 52.)

By the Court, LEONARD, J.:

The complaint in this action shows that all the plaintiffs are the legitimate minor children of Timothy G. Smith, deceased, and Harriet M. Smith, his wife; that Timothy G. died on or about December 17, 1867, at which time he was the owner, in the possession and entitled to the possession, of the property described in the complaint, an undivided one half of which is the subject of controversy; that during the life-time of said Timothy G., to wit: March 10, 1866, he selected as and for a homestead, all of said property except that portion thereof described as the south twenty-five feet of lots three and four, in block eighteen, and duly filed with the county recorder of Ormsby county, wherein said property is situated, his declaration of homestead, signed and acknowledged by him as required by law, stating all the facts requisite in such cases, which declaration was duly recorded; that during his life-time and until his death, said Timothy G. continued to reside with his family upon said premises, and to claim and use the same as a homestead; that during the settlement of said estate and while Charles Smith, brother of deceased, was administrator, to wit: June 12, 1868, upon proper and legal proceedings had and taken in the district court of said county, the property described in the declaration of homestead was, by decree of said court, set apart for the benefit of said Harriet M. and her legitimate children, the plaintiffs herein; that thereafter, upon the petition of said Harriet M., said decree, on the twenty-sixth day of February, 1870, was so amended as to include in the description of the property so set apart, the said south twenty-five feet of lots three and four, in block eighteen; that said decree, as amended, has never been reversed or modified, and has remained, and still continues, in force; that no administration was ever had or attempted to be had upon or concerning said premises, other than said decree, and the amendment

Opinion of the Court—Leonard, J.

thereto, subsequent to the making and entry thereof; that W. H. Smith, on the eighteenth day of March, 1876, was duly appointed guardian of the persons and estates of these plaintiffs, who thereafter duly qualified, entered upon the discharge of his duties and has continued to be, and now is, such guardian.

Plaintiffs allege that by reason of the facts stated they became, and now are, the owners, and entitled to the possession, of an undivided one half of all the premises set apart by the district court, together with the dwelling-house thereon and the appurtenances; that on or about June 1, 1877, defendants wrongfully entered into and upon said portion of said premises and ousted and ejected plaintiffs therefrom, and now unlawfully withhold the possession of the same from plaintiffs, to their damage in the sum of one thousand dollars; that the value of the use of said property is one hundred and twenty-five dollars per month.

Judgment is asked for the possession of the interest claimed, together with one thousand dollars damages, one hundred and twenty-five dollars per month for use and occupation, and costs of suit.

To the complaint the defendants interposed a demurrer upon two grounds: "1. That there is a defect of parties plaintiff in this, to wit: Said Harriet M. Smith is a necessary party plaintiff, without whose presence there cannot be a complete determination of the controversy in this action; 2. That said complaint does not state facts sufficient to constitute a cause of action against defendants, or either of them, in this, to wit: It appears from said complaint that the said plaintiffs, nor either of them, are the owners of said property or any part thereof. It appears from said complaint that said Harriet M. Smith is the owner of said property, and is entitled to the possession of the same."

The court below sustained the demurrer upon both grounds stated. Plaintiffs refused to amend their complaint within the time allowed therefor by the court, and judgment of dismissal and for defendants' costs was thereupon entered. Plaintiffs appeal from that judgment. We will first consider the second and most important ground of demurrer.

Opinion of the Court—Leonard, J.

As we understand them, counsel for appellants contend that, upon the death of Timothy G. Smith, the title to an undivided one half of the property set apart by decree of the district court vested in plaintiffs, and that they thereby became, and now are, entitled to the possession of the same. On the contrary, it is contended by counsel for respondents, that Timothy G. and Harriet M. held the property as "joint tenants;" that upon the death of the former the whole estate became the sole property of the latter.

There is no allegation that the property described in the complaint was the separate property of the father, and the presumption is that the premises described in the declaration of homestead, prior to the filing thereof, as well as those not included therein, were common property. (*Smith v. Smith*, 12 Cal. 224.) The questions presented require a construction of a part of our homestead and probate laws. And, first, it is proper to state certain facts shown by the statutes and decisions of California. In 1851 a homestead law was passed in that state, in all particulars essential to this case, like the one passed by our Legislature in 1861. (Wood's Dig. 1860, p. 850; Nevada Stats. 1861, p. 24.) It did not declare in terms the nature of the estate held therein by the husband and wife, or either of them. It provided that the homestead, * * * to be selected by the owner thereof, should not be subject to forced sale; and that the homestead and other property exempt from forced sale, upon the death of the head of the family, should be set apart by the probate court for the benefit of the surviving wife and his own legitimate children. Under that statute, until 1859, the supreme court decided that the homestead was held in a sort of joint tenancy by the husband and wife, with the right of survivorship. (*Taylor v. Hargous*, 4 Cal. 272; *Poole v. Gerrard*, 6 Cal. 73; *Estate of Tompkins*, 12 Cal. 114.) In 1859, in *Gee v. Moore*, 14 Cal. 472, the same court held that the doctrine announced in the previous cases cited, had never met the approbation of the profession, and said: "The wife, if surviving her husband, takes the property, not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by

Opinion of the Court—Leonard, J.

law from her husband's estate for her benefit and that of his children, if there be any. In the same way other property, exempt from forced sale, is set apart to her." (P. 478.) At the next session of the Legislature of that state, the homestead law of 1860 was passed, which, in all particulars material to this case, was precisely like our present law, passed in 1865. (C. L., sec. 186.) Both statutes, in the first section, declare that the homestead may be selected by either husband or wife, or both, and that from and after the filing for record of the declaration of homestead signed and acknowledged as provided therein, "the husband and wife shall be deemed to hold said homestead as joint tenants." In 1863, more than two years prior to the adoption of the first and fourth sections of the California homestead law of 1860 by our legislature, the supreme court stated the meaning of the words "from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants," as follows: "The distinguishing incident of a title by joint tenancy is, that the entire tenancy, or estate, upon the death of one of the joint tenants goes to the survivor, and vests in him absolutely. It would seem from this statute that it was the intention of the legislature that the homestead should vest in the surviving husband or wife absolutely, and not descend to the heirs of either." (*Estate of James*, 23 Cal. 418.) Between the date of that decision and the passage of our homestead law in 1865, no other construction was placed upon the language of the first section adopted by our legislature; nor is it claimed that a different construction has been given since, except in *Wixom's Estate*, 35 Cal. 320, and *Rich v. Tubbs*, 41 Cal. 34, to which cases we shall again refer.

In *McQuade v. Whaley*, 31 Cal. 527, decided in 1867, the court took the same view. In that case one Casement and his wife occupied the lot in question as a homestead, from 1852 until 1861, when he died. The wife conveyed the lot to plaintiff, who claimed the whole on the ground that his grantor, upon the death of her husband, held the entire property as surviving joint tenant under the homestead statute of 1860.

Opinion of the Court—Leonard, J.

The law of 1860, which was amendatory of the statute of 1851, provided that, from and after the filing for record of said declaration, the husband and wife should be deemed to hold said homestead as joint tenants; and also, that all homesteads then before appropriated and acquired by husband and wife under the statute of 1851, should be deemed to be held in joint tenancy; provided they should within one year prepare and file for record their declaration of homestead as therein required. It was admitted by counsel for plaintiff, that neither Casement nor his wife had ever filed a declaration, and the court said: * * * "In a number of cases decided between the years 1851 and 1859, it was held that the homestead was an estate held by the husband and wife in joint tenancy, and of consequence it became the absolute property of the survivor upon the death of the other. But in *Gee v. Moore*, 14 Cal. 477, these decisions were overruled on this point, and it was there declared that the doctrine that the estate was one of joint tenancy was not warranted by any language of the constitution or the statute. * * * The doctrine of the case here cited was affirmed in *Bowman v. Norton*, 16 Cal. 216, and was followed in *Brennan v. Wallace*, 25 Cal. 114. These several cases had reference to the homestead estate as created under the law as it existed prior to the passage of the act of 1860, and must be deemed as settling the construction relating to the subject as then existing. * * * We have seen that by the decisions in the cases of *Gee v. Moore* and *Bowman v. Norton*, it was held that the relation of husband and wife in respect to the homestead appropriated and acquired under the act of 1851, was not a joint tenancy, and regarding these decisions as declaring the law correctly, we are brought to the inquiry whether, by the act of 1860, that relation was created as to homesteads before then acquired, and if so, whether, by force of the statute, such a change was wrought that each party became invested with an indefeasible estate in the homestead as joint tenants, discharged of all conditions." It will be seen that the inquiry presented and proposed by the court was the same as the one under discussion in this case; because, if a joint tenancy was

created by the amendatory statute of 1860, in relation to existing homesteads acquired under the law of 1851, it is certain that the same was true concerning homesteads selected and acquired according to law after the date of the amendatory statute. The court then states the provisions of the statute of 1860, and adds:

“The amendments contained in the act of 1860 must be considered together and *in pari materia* with the provisions of the act of 1851, in order to ascertain what rights and interests were brought into being by force of these acts of the legislature acting upon given conditions precedent to their possible operation. The first section of the act of 1860 provides, that all homesteads heretofore appropriated and acquired by husband and wife under the act of 1851, shall be deemed to be held by such husband wife in joint tenancy. Had the act stopped with this provision, it might well be said, first assuming that the legislature had the power thus to create a particular estate, that by this language a joint tenancy was created in respect to all homesteads then acquired and existing under the act of 1851; but it does not stop here. The fifth section provides that those entitled to homesteads under the act of 1851, shall be entitled to the benefits of the act of 1860, and that such homesteads shall be protected to the same extent and in the same manner, as if acquired under the provisions of the act of 1860; that is, by making a declaration of intention to claim the premises selected as a homestead, and signing, acknowledging and recording such declaration; provided, however, that if any person thus claiming a homestead under the act of 1851 makes no such declaration in the mode and within the term prescribed, the homestead which he or she had under the act of 1851, shall be deemed to have been abandoned.”

The court decided against plaintiff, on the ground that Casement and wife had not filed their declaration, and hence, that the homestead was not held by them in joint tenancy. The opinion closes in these words: “It is argued on behalf of the plaintiff that as the husband died after the passage of the act of 1860, and before the time had elapsed

Opinion of the Court—Leonard, J.

within which a declaration of homestead might be made, acknowledged and recorded, the wife took the whole property as surviving joint tenant upon the death of the husband, and then became the owner in fee-simple absolute of the premises; and that, as a consequence of the concurrence of these circumstances, there was no necessity to make and record a declaration of homestead in order to secure to her the property which already belonged to her as owner thereof in fee. We have already considered the ground on which, if we are right in our interpretation of the homestead laws, it must readily appear wherein the argument of the learned counsel is at fault."

We have quoted liberally from this case for the purpose of showing, that although it went off upon a point not presented here, still the opinion shows that questions which are involved in this case were well considered in that; and we do not hesitate to express our belief that the decision would have been in favor of plaintiff had it appeared that a declaration was filed according to law. There is no intimation that the fourth section, of which, that section in our statute is a copy, tends even to modify the first; and the fifth section, which declared an abandonment if the homestead declaration was not filed in time, is not contained in our statute.

As we have seen, counsel for plaintiff in that suit based his entire case upon the claim that Casement and wife held the homestead as joint tenants, with the right of survivorship under the statute of 1860. The court did not say to him, or in any manner intimate, that such joint tenancy would not have been created had the requirements of the law been followed, which would have been a complete answer to his argument; but it did say in substance: "Admitting that the legislature had the power to create a particular estate, you could have maintained your action had a declaration been filed in the time and manner provided; but Casement and wife having failed to perform the act necessary to create a joint tenancy, you cannot recover."

In 1862, the first section of the California statute of 1860 was allowed to remain without change, while the fourth was

amended. Prior to the amendment it was as follows: "The homestead and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the probate court for the benefit of the husband or wife and his or her legitimate children; and in the event of there being no survivor or legitimate children of either husband or wife, then the property shall be subjected to the payment of their debts." * * * Following is the section as amended: "The homestead property selected by the husband and wife, or either of them, according to the provisions of said act, shall, upon the death of the husband or wife, vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them or either of them immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such debt or liability as the homestead was subject to at the time of the death of such husband or wife."

To our minds, the amended section just quoted is but an amplification of the words contained in the first section of the statute of 1860, to wit: "From and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants." In the Estate of James, the court said in 1863, two years before its adoption here: "It would seem from the statute of 1860 that it was the intention of the legislature that the homestead should vest in the surviving husband or wife absolutely, and not descend to the heirs of either." Surely no more is declared by the amended section.

The amended section was more easily comprehended by persons uneducated in the law; but to others, the use of the words "joint tenants," as they appeared in the statute of 1860, was only a short method of expressing all that is conveyed by the use of their most elaborate definition. At the time of the amendment in 1862, so far as we know, there had been no expression of opinion by the supreme court in relation to the statute of 1860. Under such cir-

Opinion of the Court—Leonard, J.

circumstances, the legislature of 1862 evidently passed the amendment of that session, for the purpose of removing all possibility of doubt upon the subject, by putting in the statute the definition of the words "joint tenants," found in all the books treating of their rights. These words have a settled meaning and constant recognition in the books, both of common law and under the statute. In Washburn on Real Prop. vol. 1, 642, the author says: "While, moreover, joint tenants constitute but one person in respect to the estate, as to the rest of the world, between themselves each is entitled to his share of the rents and profits so long as he lives, but subject to the right of the survivor or survivors to take the entire estate upon his death, to the exclusion of his heirs or personal representatives." And on page 646: "The interest which a joint tenant has as survivor, is not a new one acquired by him from his co-tenant, upon the latter's death; for his own interest is not changed in amount, but only his co-tenant's is extinguished."

Our legislature has recognized their common definition in the statute now in force concerning conveyances (Stat. 1861, p. 17, sec. 41): "Every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint tenancy."

As was said by the court in *Barber v. Babel*, 36 Cal. 17, we think "the legislature did not adopt the provision that the 'husband and wife shall be deemed to hold the homestead as joint tenants' without some object. * * * They did not intend to use a meaningless phrase, to be attended by no consequences." The words "joint tenants" have as certain, definite meaning in law as "mortgage," "lease," or "promissory note." Their use in our statute of 1865 constituted a radical difference between the old law and the new, if it appears from the whole statute that the legislature intended to use them according to their unvarying definition.

In no instance, except in the case of homesteads appropriated and selected according to the law in question, has the legislature declared that property shall be held by

the owners as joint tenants. In all other cases the statute leaves it to the owners to expressly declare that they so hold it, and if no such declaration is made, they are presumed to hold it as tenants in common. If, then, there is nothing in other sections plainly indicating that the legislature did not intend what is definitely and prominently stated in the first section, upon the question of survivorship, "the great, distinctive characteristic of joint tenancies," it seems to us there is little room for construction, and we must uphold the statute as it is written.

It is not claimed that the unmistakable meaning of section 1, when considered alone, is at all limited or modified, unless by section 4. Succinctly stated, these sections provide as follows:

Sec. 1. Upon the filing of a declaration, as herein provided, the husband and wife shall be deemed to hold said homestead as joint tenants.

Sec. 4. The homestead and other property exempted from forced sale, shall, upon the death of either husband or wife, be set apart by the court for the benefit of the surviving husband or wife and his or her legitimate children; and in the event of there being no survivor or legitimate children of either husband or wife, then the property shall be subject to the payment of their debts.

"If technical words are used in a statute, they are to be taken in a technical sense, unless it appears that they were intended to be applied differently from their ordinary or legal acceptance. (1 Kent's Com. 462.) And it may, I think, be stated, as a corollary from these principles, that when a word, by common usage, has acquired a popular signification, it shall be understood in that sense, unless its meaning is controlled by the context in which it is found, or the circumstances under which it is used." (*Clark v. City of Ulica*, 18 Barb. 453.)

In 3 Wash. (C. C. R.), 209, Mr. Justice Washington said: "If a statute of the United States uses a technical term which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary

Opinion of the Court—Leonard, J.

to refer to the source whence it is taken for its precise meaning."

In the case of *Ormsby County v. The State of Nevada*, 6 Nev. 286, the court said: "It is possible that the statute in question, upon close investigation, might fall within the general rule as quoted; but that rule, although supported by the highest authority, is, as experience has proved, of dangerous application. The cases where a court should exercise the right given under it, should be of the clearest; as when a court takes one step outside the literal wording of a statute, to declare what otherwise or elsewhere appears, there arises at once the possibility, if not the probability, of an assumption of power—judicial legislation—a thing to be most cautiously avoided under the true theory of our government, national and state. There is, though, always this distinction to be observed in settling the meaning of technical words, or words having a peculiar legal significance when they occur in a statute. Such words when used with reference to a particular subject as to which they have a special meaning, should receive that and no other; but if used generally, the natural conclusion is, that the popular meaning is the one intended."

It cannot be doubted that the words, "joint tenants," are used in the statute in question, "with reference to the particular subject as to which they have a special meaning." In fact it may be said that when properly used as designating the owners of property, real or personal, they have no other than a special meaning. This is not denied, but it is said that the legislature did not, in fact, intend to use them in that sense.

What is there, then, in section 4, which shows, clearly or otherwise, that in section 1 the legislature said one thing but meant another? It will not do to answer this question according to our ideas of the justice or injustice of allowing a homestead to be held by the husband and wife in joint tenancy, with the right of survivorship; because just and wise men have differed and will continue to differ upon this question. The statutes of different states show that there is great diversity of opinion as to what the statute should

Opinion of the Court—Leonard, J.

be, and the decisions thereon are more discordant than the statutes themselves. It may appear to the mind of one person, that it is impolitic and unjust to permit a surviving wife to take the homestead as her own property—trusting to a mother's affection and her sense of right, for the protection of the minor children, just as before the father's death their care and protection was entrusted to both—while another may regard it not only prudent, but entirely equitable to do so. The state of California has passed through many changes in relation to the homestead law, and after years of experience, and the greatest care in the preparation and adoption of her code, has finally settled upon joint tenancy of the homestead property with the right of survivorship, as the wisest and most desirable policy. So we must ascertain the intention of the legislature from an examination of the law itself. After much thought and careful study, we are unable to conclude, that the expressed and evident meaning of section 1, is in any manner or to any extent limited or modified by section 4. Certainly, the language of the latter section does not in direct terms conflict with the plain signification of the first. It contains no words which can be construed as vesting the title in any person other than the survivor, unless this language, "The homestead and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the court for the benefit of the surviving husband or wife, and his or her legitimate children," can be said to mean that, the latter "are entitled to take some interest upon the death of either husband or wife," as is said in *Rich v. Tubbs*, 41 Cal. 36. We shall endeavor to show upon an examination of that case, that such result does not follow in the sense intimated in the opinion. It would hardly be contended, under the California code, if the homestead was selected from common property according to law, that the survivor takes less than the whole estate. Paragraph 6264 (sec. 1265) of the civil code provides that: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the

Opinion of the Court—Leonard, J.

death of either of the spouses, vests in the survivor." * * * And yet, paragraph 11,465 (sec. 1465) of the same code, provides that: "Upon the return of the inventory * * * the court, or the probate judge, may, on his own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated and recorded." Can it be said that the last section quoted is in conflict with the first, or that the apparent meaning of the first is rendered doubtful by the last? We think not. Although the homestead vests in the survivor to the extent of the exemption, to wit: five thousand dollars, if it exceeds that value the excess is not exempt from forced sale, or from administration. It is the homestead described in section 1 of our statute, that is exempt, and which is required to be set apart by section 4; that is to say, a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding five thousand dollars in value. It is, therefore, necessary to include the homestead property in the inventory, that it may be appraised; then the whole or such portion as is exempt, must be set apart by the court, as property not belonging to the estate, the excess remaining to be subjected to administration. By section 4, our legislature intended to preserve the method already provided in the probate law for ascertaining the extent of homestead exemption, in order that the balance might be added to other property not exempt, to be used for the payment of debts and the expenses of administration. This, in our opinion, was the chief, if not the only reason why the first paragraph of section 4 was enacted.

In *Rich v. Tubbs*, cited by counsel for appellants, the declaration was executed and filed by both husband and wife under the California statute of 1860, upon the separate property of the wife.

The court first concludes that the effect of the order of the probate court setting apart the homestead for the use of the family of the deceased husband, "was not to change or transmit the title; that it did not adjudicate the question of

Opinion of the Court—Leonard, J.

title as between the parties who asserted a claim to it; that the purpose and effect of the order setting apart such homestead was, merely, that the property was relieved from administration—that it did not constitute assets of the estate of the deceased—and the order set it apart for whom it might concern.”

The court then adds: “In whom did the title vest upon the death of the husband? The homestead act of 1860 declares that the husband and wife shall hold the homestead property as joint tenants; but that provision is to be read in connection with the fourth section of the act, which provides that, upon the death of the husband or wife, the homestead shall be set apart by the probate court for the benefit of the survivor and his or her legitimate children. Although they are denominated joint tenants, they are not such in the full sense of the common law definition of that term. The legitimate children are entitled to take an interest, upon the death of either husband or wife. It is unnecessary, in this case, to define the nature of the interest which descends to the children; but it is clear that under the fourth section of the act of 1860, they take some interest by inheritance from their deceased father or mother. The homestead act of 1862 contains no such provision as is found in section four of the act of 1860. After providing that the husband and wife shall be joint tenants, it provides that, on the death of either, the homestead shall vest absolutely in the survivor. No provision is made therein for the inheritance of any interest in the homestead property by the children of the deceased. As the defendants (the children of the deceased husband) took nothing by inheritance, unless the law in force at the time of the decease of their father so provided, the question on which the case turns is, at what time did he die? It is found that he died in 1862, the precise time not being stated. The order of the probate court was made July 7, 1862. The homestead act of 1862 was passed and took effect May 12, 1862. It is incumbent on the defendants alleging error, in other words, claiming that they acquired interest in the homestead property by inheritance, to show that the deceased died before their

Opinion of the Court—Leonard, J.

right to take by inheritance was cut off by the passage of the act of May 12, 1862. This fact is not shown by the record." If it is true, as the court first concludes, as it undoubtedly is, that the order of the probate court setting apart the homestead for the use of the family did not change or transmit the title; that the only purpose and effect of the order was merely to relieve the property from administration, it is difficult to perceive how a provision in the homestead law requiring such an order to be made, could in any manner transmit or change the title. If the final order, when made, merely "sets the property apart for whom it may concern," and "does not in any manner change the title," we fail to see how the fourth section of the homestead law requiring such an order to be made, can possibly be said to accomplish more than is effected by the order itself. How can it be said that the legislature, by requiring the probate court to set apart the homestead, intended by that provision in the homestead law, that the legitimate children should take some interest by inheritance from their deceased father or mother," when, before the amendment of the law in 1860 and before its adoption in this state in 1865, the courts had always decided, as they have since, that the effect of the order setting apart the homestead "for the benefit of the survivor and his or her legitimate children," when made, did not in any manner affect or change the title? How could the legislature, in passing the homestead law, have intended that any other or greater effect should be given to the order of the probate court setting apart the homestead property, than the courts had, at all times, declared the effect to be?

Section 4, to which the court referred, only commanded the doing of what was already required by section 121 of the probate act, the effect of which, when done, was, as before stated; and in the *Estate of Wixom*, 35 Cal. 324, the court held that section 121, as amended subsequent to the amendment of the homestead law of 1862, did not direct or regulate the course of the title to the homestead, although it contained the words "for the use of the family." How then could those words regulate or affect the title when used

in section 4 of the homestead law? We agree with the conclusions first arrived at in *Rich v. Tubbs*, and by reason of such agreement, we are compelled to conclude that section 4 of the homestead law does not in any manner limit or modify the provision of the first section, that the "husband and wife shall be deemed to hold said homestead as joint tenants," so as to entitle a legitimate child to take any interest in such property upon the death of the father, in the sense intimated in that opinion.

We find nothing in section 4 which indicates an intention to transmit to the children, any portion of the title to a homestead appropriated and selected according to that statute. Every act done to preserve the homestead is "for the benefit" of the children as well as the parents, both before and after the death of the father or mother. While the parents are living, and when the title is undoubtedly in them, the property is exempted from forced sale as much for the benefit of the minor children as it is for the father or mother; and when the father dies it is still exempted, and is kept from administration for their benefit, as well as the mother's, because during their minority it is the parents' duty to provide them with a home, and the law presumes they will share its blessings with her. In our opinion, the privilege of sharing the homestead with the survivor, so long as it is retained as such, is the benefit intended to be secured to the children. If it is true that the benefit referred to is the right of the children, upon the death of the father, to take and use in their own name and as their own property, one half of the homestead premises, then the grand object of the law is defeated; then the children can convey their interest to a stranger, and thus destroy the home, not only as to themselves, but the survivor also. Such a result could not have been intended. And, too, if one half vests in the children, subject only to the right of the survivor to enjoy the whole as a homestead, then the estate is no more valuable to the latter than it was under the old law. Yet, in *Barber v. Babel*, 36 Cal. 18, the court says: "The express provision that the husband and wife shall be deemed to hold said homestead as joint ten-

Opinion of the Court—Leonard, J.

ants, certainly means that they shall hold some estate or interest as to the homestead different from that held before; that the estate or interest in the homestead shall be joint, and that the wife at least shall have a more distinct, specific, individual, available, indestructible and valuable interest or right than she held before; otherwise the provision is without meaning and without consequence. Aside from the terms of the act, the circumstances under which it was passed show that the object indicated was intended to be accomplished. Under the act of 1851, in a series of decisions prior to 1859, the courts held that there was in the homestead, 'a sort of joint tenancy with the right of survivorship, at least as between husband and wife,' which could not be altered or destroyed except by the concurrence of both, in the manner provided by law. This seems to have become the settled construction of the act, and was in no way interfered with by the legislative department of the government. It must therefore be supposed to have been satisfactory to the people; but at the October term, 1859, our predecessors felt called upon to overrule the prior series of decisions and adopt different views. (*Gee v. Moore*, 14 Cal. 472.) The very next legislature, however, passed the act of 1860, and thereby promptly sanctioned, by express legislative action, the views which at first prevailed, but provided a more ready and satisfactory mode of impressing the land with the homestead character, and making it a matter of public record, so that none could be misled as to the existence and extent of the homestead right. * * * * The law, doubtless, goes beyond the express injunction of the constitution upon the subject of protecting the homestead. The policy, however, was adopted by the legislature, at an early day, and has been rigidly adhered to in every amendment made during seventeen years. The prompt interference of the legislature, and restoration, substantially, of the law as first announced by the courts upon the reversal of said decisions made, shows that it had the approval of the people."

The case of the *Estate of Wixom*, 35 Cal. 324, decided in 1868, is also referred to by counsel for appellants as sus-

taining their theory. Let us see. The case was this: Wixom and wife, residing upon the property in question, filed upon it a declaration of homestead in 1861. Wixom afterwards died, and in 1867, his wife petitioned the probate court to set apart the homestead to her use. At that time the widow was living on the property, two of her children, minors, being with her. The court refused to grant the widow's petition, holding that there were minor heirs who were entitled to share the homestead with her. The supreme court reversed the order denying the petition, on the ground that under the homestead act of 1862, then in force, the property vested in the widow, upon the death of her husband. After referring to the homestead and probate acts of 1851, the court says: "A radical change, however, has been made in the homestead act, which now provides that, upon the death of either husband or wife, the homestead property shall vest absolutely in the survivor, subject only to such debts or liabilities as were a legal charge upon it at the time of the death of such husband or wife. This change was made in 1862. To have maintained entire consistency, the one hundred and twenty-first and one hundred and twenty-fifth sections of the probate act (corresponding with sections 123 and 127 of our probate statute) should have been amended in like manner." * * * It is claimed the language quoted shows that, in the opinion of the court, the change in the homestead law of that state, making the husband and wife joint tenants with the right of survivorship, was not wrought until 1862. We do not think so.

It will be noticed that it was a matter of no consequence when the change took place, if it was subsequent to the date of the probate law, and the statute embodying the change was in force at the time of Wixom's death; both of which facts were true as to the law of 1862. The statute of 1860 was not in force at either date, and could not affect the case. The court therefore, naturally and necessarily, referred to the existing statute as the controlling law. The statute of 1860 was a dead letter, and it would have been strange, indeed, if the court had mentioned that, which did not affect

Opinion of the Court—Leonard, J.

the case, instead of the one in force, which controlled the decision. Notice the language: "A radical change, however, has been made in the homestead act (that is, since 1851) which now provides (statute of 1862) that upon the death of either husband or wife the homestead property shall vest absolutely in the survivor. * * * This change was made in 1862." The court intended to say that the statute, the provisions of which were stated, was enacted in 1862. It did not intend to say that, until 1862, the homestead was not held by the husband and wife in joint tenancy.

Our opinion is, that upon the death of their father, plaintiffs did not inherit one half or any portion of the homestead described in the declaration, and that, as to such property the complaint does not state a cause of action, regardless of section 127 of the probate law, the homestead statute being the last expressed will of the legislature. (*Estate of Wixom, supra.*)

But the south twenty-five feet of lots 3 and 4, in block 18, described in the complaint, were not included in the declaration, and a joint tenancy therein was not created between plaintiffs' father and mother under the first section of the homestead law. (*McQuade v. Whalley, supra*; C. L., sec. 186.)

It was set apart by order of the district court for the benefit of the widow and children, but, as we have seen, such order did not change or transmit the title. Its only object and effect was to relieve it from payment of the general debts contracted by the husband during his life-time, and from debts accruing in the course of administration. (*Rich v. Tubbs, supra*; *Estate of David Valley*, 11 Nev. 264-5.) Under the eleventh section of the statute defining the rights of husband and wife, which was in force at the time of the death of T. G. Smith (Stat. 164-5, p. 240), if this was common property, one half vested in Harriet M. Smith and the other half in plaintiffs, who were tenants in common therein with their mother. (*Broad v. Broad*, 40 Cal. 496; *Broad v. Murray*, 44 Id. 228.) True, they took their inherited interest subject to the mother's rights therein, whatever they

Opinion of the Court—Leonard, J.

were, after the order of the court setting it apart was made; but the title to one half was in them, as well as the right of entry and possession, at least during their minority, and while it was used as a homestead; and if for any reason the homestead claim was abandoned, or ceased to exist, "the right of plaintiffs became absolute, and entitled them to the immediate possession of their undivided interest in the property." (*Johnston v. Bush*, 49 Cal. 201.) If, then, this was common property—and such is the presumption—plaintiffs, being minors, had both title and right of possession, as to one half of the same. Counsel for respondents claim that it was not common property, for the reason that section 11, above referred to, provided that in case of the death of the husband, the entire common property should be equally subject to his debts, the family allowance, and the expenses of administration; that the homestead cannot be made subject to such expenses, and consequently, that it was not common property. It was decided by this court, in the case of the *Estate of Walley*, *supra*, that the homestead law of 1865 did not repeal the sections of the probate law providing for setting apart the homestead. The latter, then, must be construed, in this case, with the homestead statute, and the statute defining the rights of husband and wife, in force at the time of the death of plaintiff's father. (Statute 1864-5, p. 239.) A homestead selected and declared upon according to the requirements of the existing statute is not common property, in the sense intended in the statute defining the rights of husbands and wives, and cannot be subjected to administration (*Estate of Tompkins*, 12 Cal. 124); but a homestead not so selected can be so used, unless it is set apart by the court, because it is common property after the death of the father, if it was such before. In case of a homestead that has been set apart merely by order of the court, the general provision of section 11 of the statute defining the rights of husbands and wives, above referred to, which provided that the entire common property should be subject to the husband's debts, in case of his death, is controlled by the provision of the probate law, which declares that the homestead shall be set apart by the court and relieved from administration. (*People v. Wells*, 11 Cal. 329.)

Opinion of Beatty, J., dissenting.

This portion of the premises described in the complaint having been common property, an undivided one half, upon the death of the father, vested in plaintiffs, who then held the same as tenants in common with their mother, as before stated. At the time the action was commenced plaintiffs had the right of possession as against defendants. (*Johnston v. Bush, supra.*)

We think, also, that upon the facts stated in the complaint plaintiffs would be entitled to judgment for possession of their half of the same, without making their mother one of the parties plaintiff. (*Updegraff v. Trask*, 18 Cal. 458; C. L., 1077.)

Should it be necessary, upon the filing of an answer, or at any time during the progress of the trial, to bring in the mother, the court has full power to so order. At present we cannot say that, as to this property, she is a necessary party.

The judgment is reversed and the cause remanded. The district court will enter an order overruling defendants' demurrer, with leave to file answer.

BEATTY, J., dissenting:

I concur in so much of the opinion of the court as holds that the plaintiffs inherited an interest in that portion of the demanded premises which was not included in the declaration of homestead, and I concur in the conclusion that the judgment of the district court should be reversed. But upon the more important question which is so largely discussed by Justice Leonard, I dissent from the views of my associates.

In my opinion, our homestead law of 1865, considered without reference to the circumstances under which it was borrowed from the state of California, does not sustain the construction which is placed upon it. The first section, it is true, provides that the homestead shall be held by the husband and wife as joint tenants, and if that section stood alone there would be no reason to suppose that the legislature meant anything different from what they said, though even then it would not necessarily follow that the right of

Opinion of Beatty, J., dissenting.

survivorship incident to an estate in joint tenancy would attach to the *fee*. On the contrary, if section 4 was out of the act, it might reasonably be held that the right of survivorship attached only to the homestead as such, and that whenever it ceased to be a homestead, the estate would descend to the heirs of the person or persons who owned it at the time it was declared upon. But the provisions of section 4 must be considered together with those of the first section; and they are not only useless, they are positively repugnant, upon the supposition that the homestead is held by husband and wife in strict joint tenancy. I prefer to give their full force and effect to the specific provisions of section 4 rather than to the technical words "joint tenants" in section 1. Every member of the legislature knows what he means when he gives particular directions that property shall be set apart for the use of the widow and children of a deceased person, but how many know the meaning of joint tenancy?

If the circumstances under which our homestead law was adopted are considered, I think that, far from weakening, they add very greatly to the force of these conclusions. There is no room for doubt that the occasion for enacting a new homestead law in 1865 was the requirement of the constitution then newly adopted (art. iv, sec. 30) that laws should be passed providing for the recording of homesteads in the counties wherein they were situated. In compliance with this injunction of the constitution the California law of 1860 was copied. An attempt is made in the opinion of the court to show that when we borrowed the California act it had already received the construction here placed upon it, but I think the California decisions referred to by the court may be safely challenged to show that not only had the act of 1860 never been so construed before we adopted it, but it has never been so construed to this day. On the contrary it has been construed otherwise. The expression let fall by Judge Crocker in the case in 23 Cal. (*Estate of James*), was as loose a dictum as can be found in the reports of that state, upon a point the decision of which was expressly avoided, and has never been referred to in any

Opinion of Beatty, J., dissenting.

subsequent opinion of their supreme court as having the semblance of authority. A dictum which receives no consideration whatever in the court where it is uttered certainly does not grow into authority when transported into another state.

Much more importance, I think, is attributable to the fact that when we adopted our homestead law and resorted to California for a model, we had their act of 1860 as originally adopted and as amended in 1862 to choose between. The language of the amendment of 1862 is quoted in the foregoing opinion, and no one can doubt that it was intended to add the incident of survivorship to the estate created by the act of 1860. We chose the act of 1860 and rejected the act of 1862. The inference is that we did not desire the law of 1862.

The California cases involving a construction of their various homestead laws are extensively quoted in the opinion of the court, and an attempt is made to show that they sustain its conclusions; but those who may have the curiosity to examine the cases in the reports will find, if I am not mistaken, that they are all consistent with the conclusion that it was not until the act of 1862 that the right of survivorship attached to the homestead. The very opinion of Judge Sawyer from which such extensive quotations are made (see *Barber v. Babel*, 36 Cal. at page 17) says: "And since the amendment of 1862 the right of survivorship, the grand incident of joint tenancy is added," showing plainly that he did not mean what it is assumed he meant by other portions of his opinion. It is not worth while, however, to pursue this subject, as my only desire is to record my dissent from a decision which, henceforth, becomes a rule of property in this state and involves the consequence of dis-inheriting a man's children in favor of those of another. In my opinion this is a much more serious consequence than those which are depicted in the opinion of the court; and those consequences by no means follow from my construction of the law. There is no difficulty in holding that a child may inherit an interest in the homestead from its deceased parent without being driven to the conclusion that

Opinion of Leonard, J., for rehearing.

it could thereby destroy the homestead. Its interest would remain in abeyance, while the property retained the character of a homestead, and until the death of the survivor of its parents, but could then be asserted and enforced.

RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, J.:

We are asked by appellants to grant a rehearing in this case, mainly upon the ground stated in the petition, that if the legislature contemplated that the husband and wife should hold the homestead strictly as joint tenants, it necessarily follows that either tenant may convey his or her interest to a co-tenant or even to a stranger, and thus destroy the homestead. We do not think that under the constitution and statute, a homestead is held by the husband and wife strictly as joint tenants. The constitution provides that "a homestead * * * shall not be alienated without the joint consent of husband and wife, when that relation exists;" and by statute it is enacted that homestead property shall not be deemed to be abandoned without a declaration thereof in writing, signed and acknowledged by both husband and wife according to law. But we do think the husband and wife hold the homestead as joint tenants, except so far as the usual rights of such tenants have been limited or modified by the constitution and the statutes. In the opinion of the court filed in this case, we had no occasion to consider whether any other elements of a strict joint tenancy than that of survivorship were or were not retained by the statute. We said: "If there is nothing in other sections plainly indicating that the legislature did not intend what is definitely and prominently stated in the first section, upon the question of survivorship, 'the great distinctive characteristic of joint tenancy,' it seems to us there is little room for construction, and we must uphold the statute as it is written." The power of alienation by either husband or wife, without the consent and joint act of the other, solemnly evidenced by deed duly acknowledged, is prohibited by the constitution and statute; but there is

Points decided.

nothing in either indicating an intention of abridging the usual rights of joint tenants as to survivorship.

We do not deem it necessary to do more than to refer to the opinion filed in answer to the other grounds urged in support of appellants' petition. To our minds the statute is plain, and the intention of the legislature unmistakable. If the policy of the present law is unsatisfactory to the people, a change must be wrought by legislative action.

Rehearing denied.

BEATTY, J. dissenting:
I dissent.

[No. 897.]

HENRY SCHAFER, RESPONDENT, v. GILMER & SALISBURY, APPELLANTS.

INSTRUCTIONS—PLEADINGS—EVIDENCE.—The instructions given by the court must be considered with reference to the pleadings and the evidence. The court is not required to instruct the jury upon any question not raised by the pleadings nor authorized by the evidence.

STAGE PROPRIETORS—LIABILITY FOR INJURIES RECEIVED BY PASSENGERS.—Proprietors of stage-coaches are liable for any injury that a passenger may receive on account of their negligence to furnish prudent, skillful and sober drivers.

IDEM—DUTY OF THE JURY.—It is the duty of the jury to determine the nature and extent of the injuries received by the plaintiff as a passenger upon defendants' stage-coach, and to consider such injuries in making up their verdict.

PERJURY OF WITNESS—INSTRUCTIONS.—During the trial the court asked Wadleigh, the driver of the stage, this question: "Did the stage tip over that day between Robinson and Cherry creek?" Wadleigh answered: "I swear positively that it did not." To the same question Schafer, the plaintiff, answered: "Yes, sir; I am positive it did." The court, of its own motion, instructed the jury as follows: "In this case there is plain perjury on one side or the other. Either the plaintiff, Henry Schafer, committed perjury or the witness Wadleigh, and on one or the other of them ought to be in the penitentiary, instead of being in this courtroom;" *Held*, not erroneous.

DAMAGES, WHEN NOT EXCESSIVE.—The plaintiff claimed that, by the upsetting of defendants' stage-coach, he was so badly injured as to produce pneumonia, and that the disease of his lungs, arising from such injuries, had become incurable. Upon this question there was a direct conflict of evidence: *Held*, that if the jury believed the testimony offered upon the part of plaintiff to be true, a verdict in his favor of five thousand dollars was not excessive.

Statement of Facts.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The eighth instruction referred to in the opinion of the court reads as follows: "If you find that the plaintiff took passage on the stage of the defendants to be transported from Cherry creek to Robinson, and while on the road the driver of the coach became so intoxicated as to incapacitate him for driving, and an accident occurred by which plaintiff was injured, the defendants are liable for the injury, no matter who was driving. It is not the law that a sober passenger is compelled to drive a stage-coach for a drunken driver, and then take all the perils of the trip."

The sixth instruction asked by defendant read as follows: "You are instructed that no mere probability that the plaintiff's injuries were caused by the upsetting of defendants' stage will justify you in giving him a verdict." The court added: "But if you are satisfied, from the evidence, that the plaintiff did receive such injuries, then you are justified in taking such injuries into consideration in making up your verdict."

Dr. Owen, a witness upon the part of the defendant, in giving evidence as to whether the disease of plaintiff's lungs arose from natural causes or from external wounds, testified as follows: "I am a physician and surgeon; a regular graduate of a medical college; have been engaged in such practice over thirty years. I have examined the plaintiff several times; he is suffering from inflammation of the left lung, and the right lung is slightly affected. I have heard most of the evidence in this case; from all the evidence I have heard, and I heard all of Schaffer's and most of Rockman's, from my examination of plaintiff, and also judging from my medical experience, I consider that the disease from which plaintiff is now suffering was produced by pneumonia, and that the pneumonia was produced by natural causes. I find the lungs diseased, the respiratory murmur is enfeebled; I noticed a marked change in the lungs on different examinations; I think that the dullness of sound was caused by the thickening or consolidation of the lung; I should think, on

Statement of Facts.

account of the number of cases, that the pneumonia arose from natural causes; I should think the chances are largely in favor of *idiopathic* causes; I do not deny that it might have arisen from *traumatic* causes. It might be twelve, twenty-four or forty-eight hours before a man would complain, or rather when pneumonia would set in when arising from *traumatic* causes. The pain would result immediately. If a person had taken baths for a number of days at warm springs such as those at Cherry Creek are described to be by witnesses in this case, such baths would weaken the system and open the pores of the skin; then if a person should take a tiresome trip on a stage such as that from Cherry Creek to Ward is known to be, and that also in cold weather, the condition of the person when starting on the trip, the fatigue of the trip and the inhalation of cold air, would be much more likely to produce pneumonia than such injuries plaintiff claims to have received from the overthrowing of the stage would be to produce such disease. Surface wounds must be very severe to produce pneumonia. It is very seldom that pneumonia is produced by other than natural causes. In all my practice I have never seen a well-defined case of pneumonia arising from other than natural causes; the fact that plaintiff has been suffering from rheumatic diseases, been taking baths in the warm springs and riding long distances in cold weather, are sufficient of themselves to account for the disease of plaintiff. In my judgment, the disease of plaintiff is clearly traceable to natural causes, and not to external wounds. I have never yet seen a case of pneumonia arising from external wounds."

Dr. Chamblin and Dr. Bishop testified on behalf of defendant to the same effect.

Dr. Rockman, on behalf of plaintiff, testified as follows: "I am a practicing physician and surgeon; have been for at least sixteen years in average practice; I belong to the allopathic or old school; I have been educated in Europe and America; I know the plaintiff; first knew him in the latter part of December last year; he called upon me for treatment; he complained of his side and back, which he claimed had been hurt from an injury caused by the up-

Statement of Facts.

setting of a stage; I gave him a *hyperdermic* injection, thinking his muscles were affected; the next day he came again and complained of great pain, and I gave him another injection; he came again in the evening, and I gave him another; the third day he had a severe attack of hiccough, so severe that I had to give him chloroform to stop it; I then told him to go home, that I would be around to examine him; he was very weak, and slept on the sofa in my office for the space of four or five hours that day; on the next morning I went to visit him, and made an examination of his lungs, and found that he had inflammation of the lungs, and I treated him for that; inflammation developed in the usual way until the sixth or seventh day after I first treated him, and then he expectorated a gangrenous mass, with clotted blood, decomposed; he had gangrene of the left lung; I treated him for about a month, and then advised him to go to San Francisco; when I examined him he had several bruises on the back and chest; there are different causes which produce inflammation of the lungs; any injury, if severe enough, will produce pneumonia; from his statement to me of his having received an injury, I took it that the inflammation of the lungs arose from that cause; the clotted blood showed that it had been some time in the lung; he coughed at the time he expectorated the blood; the extraneous matter in the lung caused the coughing; he continued expectorating blood pretty much every day, at first, a good deal, and after a little while it ceased somewhat; I have examined him lately; his left lung is consolidated, and there is a small cavity between the second and fourth ribs; he spits blood now; some of the blood was black, of a rusty color, and some fresh blood; the right lung was somewhat affected; now I think there is a *pleuretic* effusion of the right lung; at the time I treated him first, the left lung alone was affected; I think the *pleuretic* effusion of the right lung has been caused by the inflammation of the left lung, through sympathy; as soon as the blood exudes from the lungs it coagulates; hemorrhage often arises from various causes; the left lung is pretty well condensed, but it performs some slight functions yet." The conclusion of his testimony is stated in the opinion.

Argument for Appellant.

A. M. Hillhouse, for Appellant.

I. A plaintiff must plead and prove that he was at the time of the alleged accident without fault. (*Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Butterfield v. Forester*, 11 East. 60; *Lynch v. Nurdin*, 1 Ad. & El. 35; *Clayards v. Dethick*, 12 Id. 439 and 447; *Gough v. Bryan*, 2 Mees. & Wel. 773; *Bridge v. Grand Junction R. R. Co.*, 3 Mees. & Wel. 247-8; *Martin v. G. N. R. Co.*, 30 Eng. Law and Eq. R. 473; *Rathbun v. Payne*, 19 Wend. 399; *Bush v. Brainard*, 1 Cow. 78; *Hartfield v. Roper*, 21 Wend. 615; *Adams v. Carlile*, 21 Pick. 146; *Gahagan v. B. & L. R. Co.*, 1 Allen, 187.)

II. Plaintiff's instructions Nos. 1, 3, 4, 5 and 7 each say that: "If plaintiff was injured through the carelessness, etc., of defendants or their driver, that plaintiff must recover." The question of contributory negligence is in each instruction absolutely ignored. This was erroneous. (*Wilds v. Hudson River R. R.*, 24 N. Y. 430; *Spencer v. U. & S. R. Co.*, 5 Barb. 337; *Fox v. Town of Glastenburg*, 29 Conn. 209; *Murphy v. Deane*, 101 Mass. 455; *Sherman & Redfield on Negligence*, 28, and cases cited.)

III. Plaintiff's instruction No. 8 not only ignores all questions of contributory negligence, but assumes as a fact that plaintiff was compelled to drive. It tells the jury that if an accident occurred while defendant's driver was drunk, that independent of everything else entitles plaintiff to recover. This instruction is entirely erroneous.

IV. If a passenger upon a stage-coach takes the lines and drives the team for a drunken driver, that is contributory negligence. As soon as a passenger takes the reins and assumes to drive for the carrier he becomes a servant of the carrier, and is subject to all the rules of law applicable to cases when a servant in the employ of his master receives an injury. (*Wood's Law of Master and Servant*, 678, 997; *Degg v. Midland R.*, 1 Hurlstone & Norman, 773; *Potter v. Faulkner*, 3 L. J. Q. B. 30 Exch., 5 L. T. 455; *Warburton v. The Great Western R.*, L. R. 2 Exch. 30-36, L. J. Ex. 9; *S. & R. on Negligence*, 109.

Argument for Respondent.

V. The court erred in refusing to give the sixth instruction as asked by defendant, and in modifying the same so as to destroy its force and effect as a correct principle of law. (*Gerhauser v. N. B. & M. Ins. Co.*, 6 Nev. 15; *Underhill v. N. Y. & H. R. R. Co.*, 21 Barb. 489; *Gale v. Wells*, 12 Barb. 84.)

VI. The court erred in its oral charge to the jury. The jury was sworn to try only the issues made in the present action, not to pass upon questions of perjury. A jury should always be instructed to reconcile all the testimony, if possible, that no one will be by their verdict accused of perjury. This charge was not only calculated to, but evidently did, induce the jury to give a larger sum than without it would have been given; caused a prejudice against the defendants in the minds of the jurymen which induced a verdict. A jury is always liable to be influenced by the views of the presiding judge. (*Fay v. Grimstead*, 1 Barb. 321; *Bathune v. McCrary*, 8 Geo. 114; *Crossman v. Harrison*, 4 N. Y. 39; *Graham & Waterman on New Trials*, head "misdirection of judge" in charging irrelevant matters.)

VII. The verdict of the jury is excessive. The injuries from which plaintiff was suffering came from natural causes.

IV. IV. *Bishop*, also for Appellant.

George W. Baker and John T. Baker, for Respondent.

I. Contributory negligence is a matter of defense. It not be alleged by the plaintiff. (*Sherman & Redfield on Negligence*, sec. 44; *Robinson v. The Western Pacific Railroad Co.*, 48 Cal. 409; *Railroad Company v. Gladmon*, 15 Wall. 401; *Knaresborough v. Belcher S. and M. Co.*, 3 Sawyer, 446; *Beatty v. Gilmore*, 16 Penna. Stat. 463; *Durant v. Palmer*, 29 N. J. Law Reports, 544; *May v. Hanson*, 5 Cal. 360; *Boyce v. Cal. Stage Co.*, 25 Cal. 460; *New Jersey Express Co. v. Jonathan Nichols*, 32 N. J. Law Reports, 166; *Johnson v. Hudson River R. R.*, 20 N. Y., 65; *Finn v. Vallejo St. Wharf Co.*, 7 Cal. 253; *Redfield on Carriers*, 281, Note 20.)

II. The acts of plaintiff did not constitute him a servant

Opinion of the Court—Hawley, C. J.

of the defendant. (Shearman & Redfield on Negligence, 107; *May v. Hanson*, 5 Cal. 360.)

III. The court was authorized to modify the instructions. (*People v. Doge*, 30 Cal. 448.)

IV. A judgment will not be reversed on account of erroneous instructions to the jury when it is apparent the verdict would have been the same with correct instructions. (*Green et al. v. Ophir Co.*, 45 Cal. 522; *Robinson v. Western Pacific R. R. Co.*, 48 Id. 409.) If all the instructions taken together present to the jury a correct statement of the law of the case courts will not interfere with the verdict, although some slight errors may have crept into one particular instruction. (34 Cal. 641; 22 Id. 42; 6 Nev. 109 and 244; 18 Cal. 376; 22 Id. 22; 38 Id. 362; 6 Nev. 265; 45 Cal. 522.)

V. The eighth instruction as to the duty of stage proprietors in employing skillful and competent drivers is correct; *Peck v. Neil*, 3 McLean, 22; *Stokes v. Saltonstall*, 13 Peters, 181; Angel on Carriers, sec. 540; 13 Cal. 599; 15 Wallace, 401; Angel on Carriers, 541; Note, same, 547; *Sherman & Redfield on Negligence*, sec. 594; *Redfield on Carriers*, secs. 340 and 341; 3 Sawyer, 446; *Boise v. Anderson*, 2 Peters, 150; *Fuller v. Naugatuck R.*, 21 Conn. 557.

By the Court, HAWLEY, C. J.:

This is an action brought by the plaintiff to recover the sum of ten thousand dollars damages, for injuries alleged to have been received by him while a passenger on the defendants' stage-coach in traveling from Cherry Creek to Robinson, in White Pine County.

Plaintiff recovered a judgment for five thousand dollars, from which, and from an order of the court overruling a motion for a new trial, the defendants appeal.

Appellants, upon the trial of the cause, relied upon three separate and distinct defenses: 1. That the stage did not upset; 2. That if it did upset, plaintiff was not injured; 3. That if it did upset, and if plaintiff was injured, he was guilty of contributory negligence, and was (if driving) at the time of the accident a servant of the defendants.

1. Most of the objections by appellants are based upon the ground that the court in giving instructions to the jury ignored "all question of contributory negligence."

It is a well settled principle of law that the instructions given must be considered with reference to the pleadings and the evidence. In this case the question of contributory negligence is not raised in the pleadings, and no testimony was offered that would authorize its consideration by the jury. In fact, there is no evidence to sustain the third defense relied upon by appellants' counsel.

The plaintiff Schafer was the only passenger on the stage-coach at the time of the alleged accident, and he and the driver were the only persons present when it occurred. Wadleigh, the driver of the coach, was intoxicated. Schafer testified that about five miles out from Cherry Creek the driver went to sleep; that he then took the lines and drove the team until the driver woke up; that Wadleigh, after waking up, took the lines out of his hands and commenced whipping the horses; that the horses commenced running; that one of the lines, to quote the language of the witness, "dropped on the ground, caught on the wheel, jerked the horses out from the road on the off side; I hollered 'whoa' to stop the horses, and they checked up a good deal. Wadleigh was pulling on one line and I told him not to pull too hard or he would upset sure. * * * The ground was slanting to the nigh side, and the stage ran into a little gully, and Wadleigh pulling on the nigh line caused the stage to cramp when it struck the gully, and it upset. I was sitting on the nigh side. I fell on the left side, on a rock. Wadleigh fell on top of my breast."

The only pretense that plaintiff was guilty of contributory negligence is based upon the imaginary idea that he might have been driving the team at the time of the accident.

It is true that the witness Wadleigh told some parties that he had no recollection of the stage upsetting, "but if it did upset Schafer was driving," and he testified upon the trial that Schafer told him after he woke up that they had had a tip over but that nobody was hurt. If he had stopped

Opinion of the Court—Hawley, C. J.

here there might have been some slight foundation upon which to submit the question to the jury whether or not respondent was driving at the time of the accident. But he further testified that he did not think it possible that the stage could have been upset without his knowing it. He admitted that he was driving at the place where Schaffer testified the accident occurred, but denied that the stage upset at that or any other place. This denial was made without any qualification whatever. At the close of his testimony the court asked him this question: "Mr. Wadleigh, do I understand you to say the stage did not tip over on that day between Cherry Creek and Robinson?" Answer—"I swear positively that it did not."

In the face of this testimony it cannot be reasonably claimed that there was any evidence tending to show that plaintiff was guilty of contributory negligence.

2. The eighth instruction given by the court, if erroneous at all (under the facts and circumstances of this case), is only so because it authorized the jury to consider a false quantity by taking into consideration the question whether plaintiff was driving at the time of the accident.

From the conclusions already reached it is evident that the appellants could not have been prejudiced by the giving of this instruction.

The law compels stage proprietors to furnish prudent and skillful drivers, and holds them liable for any injury that a passenger may receive on account of any negligence in this particular. (*McKinney v. Neil*, 1 McLean, 540; *Stockton v. Frey*, 4 Gill, 406; *Farish & Co. v. Reigle*, 11 Grat. 697; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Stokes v. Salstontall*, 13 Pet. 181; *Sawyer v. Dulaney*, 30 Tex. 479; *Redfield on Carriers*, sec. 340; *Angell on Carriers*, sec. 569.)

3. The court did not err in modifying the sixth instruction asked by defendants' counsel.

If it be true that no mere probability, that the plaintiff was injured by the upsetting of the stage, would justify the jury in finding a verdict in his favor; yet if the jury was satisfied from the evidence that plaintiff did receive the injuries complained of by the upsetting of defendants' coach,

through the negligence of the driver, then it was the duty of the jury to take into consideration the injuries thus received, in making up their verdict.

In other words it was the duty of the jury to determine the nature and extent of the injuries that plaintiff received by the upsetting of the coach, and they were authorized by this instruction, as modified, to consider "such injuries" in making up their verdict.

4. It is claimed that the court erred in giving an oral charge to the jury in the following words: "This is an action wherein plaintiff sues defendants for ten thousand dollars for injuries alleged to have been occasioned by the upsetting of a stage-coach of defendants. The plaintiff complains that his injuries resulted from the upsetting of defendants' stage. Defendants claim that this stage never was upset. Also, that the alleged injuries came from natural causes.

"In this case there is plain perjury on one side or the other. Either the plaintiff, Henry Schafer, committed perjury or the witness Wadleigh, and one or the other of them ought to be in the penitentiary instead of being in this court-room."

This charge was given to the jury before any of the written instructions were read. The objections urged by appellants' counsel are to that portion charging perjury.

It will be observed that there is no intimation from the court as to which party it deemed guilty of the offense. It was left to the jury to determine the truth or falsity of the respective statements sworn to by the witnesses, Schafer and Wadleigh. These witnesses had solemnly testified diametrically opposite.

In reply to the question asked by the court, "Did the stage tip over that day, between Robinson and Cherry Creek?" Wadleigh answered: "I swear positively that it did not;" Schafer answered: "Yes, sir; I am positive it did." The court, in charging the jurors that there was false swearing "on one side or the other," only told them what they already knew, or ought to have known. Such remarks do not entitle a party to a new trial. (*State v. Glover*, 10

Nev. 24.) Perhaps it would have been better for the court to have withheld its opinion that either Schafer or Wadleigh ought to be in the penitentiary. But it is apparent that the remarks of the court were only intended, and could only have been understood by the jury, as placing the seal of its condemnation upon the crime of false swearing, and to impress upon the minds of the jurors that it was their duty to determine which one of the witnesses had sworn falsely. .

5. The jury, in awarding damages to the extent of five thousand dollars, must necessarily have found as a fact that the injuries from which plaintiff was suffering were produced by the accident, and did not come from natural causes. Upon this point there is a substantial conflict in the evidence. We are of the opinion that there is sufficient testimony to sustain the verdict of the jury.

Dr. Rockman, the physician called to attend plaintiff shortly after the accident occurred, after giving a detailed statement of plaintiff's injuries, concludes his testimony as follows:

"From the examination of the plaintiff I consider that he has a very poor chance for recovery. I do not think he can ever perform manual labor. From an examination of plaintiff's lungs at the present time, it is impossible for any physician to diagnose the disease so as to tell exactly the origin of it; that is, whether the present injured state of the lungs arose from *traumatic* or *idiopathic* causes; but, from my knowledge of his case from the start, and from the examination made at the commencement of his sickness, the development of the disease then, and from the examinations recently made and the present development of the disease, in my opinion there is no doubt but the injuries to plaintiff's lungs arose from *traumatic* causes; that is, from some injury received, and that it is not *thesis* or natural consumption."

If the jury believed these conclusions to be correct, and that plaintiff received the injuries by the negligent upsetting of defendants' coach, the amount of the verdict is not excessive.

The judgment of the district court is affirmed.

Argument for Appellants.

[No. 879.]

**AMBROSE GAUDETTE, RESPONDENT, v. JOHN ROEDER
ET AL., APPELLANTS.**

COMPLAINT ON INDEMNITY BOND—SUFFICIENCY OF.—Roeder brought an attachment suit against Guertin. Travis, as sheriff, levied the attachment upon certain personal property. Gaudette gave Travis notice that he owned the property. Roeder required the sheriff to retain said property, and gave him an indemnifying bond, with Glissan and Sultan as sureties. The property was retained by the sheriff, who afterwards sold the same at sheriff's sale, under execution in the suit of *Roeder v. Guertin*. Gaudette brought an action against Travis, to recover the said personal property or its value, and obtained judgment. An execution was issued upon this judgment, and returned unsatisfied. No part of the judgment has been paid. The bond of indemnity was assigned to Gaudette by the sheriff. Gaudette brought this action against Roeder, Glissan and Sultan to recover the amount due on his judgment against Travis. *Held*, that a complaint properly alleging these facts stated a good cause of action.

SECTION 591 OF CIVIL PRACTICE ACT CONSTRUED—SURETIES—BOND OF INDEMNITY.—In construing the provisions of section 591 of the civil practice act (1 Comp. L. 1651): *Held*, that the provisions of said section could only be invoked by the sheriff; that an order substituting the sureties as defendants in place of the sheriff was utterly null and void.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

Bishop & Sabin, for Appellants.

I. The terms of the bond could not be changed by a parol agreement between Roeder and Travis, neither could Roeder and Travis enter into any agreement to bind the defendants Glissan and Sultan without their consent. (*Quillen v. Arnold*, 12 Nev. 234; *Miller v. Stewart et al.*, 9 Wheat. 680; *Bowers v. Beck et al.*, 2 Nev. 152; 10 Johnson, 180.)

II. The judgment of *Gaudette v. Glissan et al.* is a perfect bar to this action. (*Dutil v. Pacheco et al.*, 21 Cal. 438; Freeman on Judgments, secs. 247, 248, 249, 256, and cases there cited; *J. B. Chase and Thos. DeVries v. Chas. H. Christianson and R. Murdock et al.*, 41 Cal. 253; Freeman on Judgments, p. 207; *Jackson v. Lodge*, 36 Cal. 28; *Boggs v.*

Argument for Respondent.

Clark, 37 Id. 236; *Herman on Law of Estoppel*, 159, 163, 164, 165, 175, 176, 179, 180, 183, 185, 187; *Paul v. Armstrong*, 1 Nev. 82.) That judgment is now final. (*Cal. St. Tel. Co. v. Patterson*, 6 Nev. 150; *State v. Logan*, 1 Id. 509.) Even if erroneous, that judgment had long before the commencement of this action become valid by lapse of time. (*Bullion M. Co. v. Croesus M. Co.*, 3 Nev. 336.)

Fuller & Sawyer, also for Appellants.

I. A bond taken by an officer without authority is void. (*Benedict v. Bray*, 2 Cal. 251; *Stark v. Raney*, 18 Cal. 622.) The bond sued upon was not a statutory bond of indemnity. It was void at common law as being an indemnification for the consequences of an illegal act, and therefore contrary to public policy. (1 *Bouvier's Law Dic.* 331; title "Consideration" and cases cited; *Servanti v. Lusk*, 43 Cal. 233; 1 *Parsons on Cont.* 456 *et seq.*)

II. To recover on a bond, a full compliance with the conditions must be shown. (*Osborn v. Elliott*, 1 Cal. 337; *People v. Jackson*, 24 Id. 632; *Hatch v. Peel*, 22 Barb. 580; *Couch v. Ingersoll*, 2 Pick. 292; *Kane v. Hood*, 13 Pick. 281.

A. B. Hunt, for Respondent.

I. The demurrer was properly overruled. (*Grain v. Aldrich*, 38 Cal. 514.)

II. A void judgment is in legal effect no judgment. (*Freeman on judgments*, 117, and cases cited.) Where the court has no jurisdiction either of the subject-matter or of the parties, its judgment is absolutely void. (*Hahn v. Kelly*, 34 Cal. 402; *Campbell v. McCahan et al.*, 41 Ill. 45; *Hollingsworth v. Bagley*, 35 Tex.) The court had no power on the motion of Travis to order judgment to be entered in favor of Gaudette against the sureties on the bond. (*Cohn v. Barrett*, 5 Cal. 210; *Turner et al. v. Tuolumne Water Co.*, 25 Cal. 400; *Leak v. Blasdel*, 6 Nev. 40; *State ex rel. Wall v. Blasdel*, 4 Nev. 241.) Hence that judgment is no bar to the present action. (*Earl v. Bull*, 15 Cal. 425; *Grey et al. v. Dougherty et al.*, 25 Id. 273; *Hardenbergh v. Bacon*, 33 Id. 375; *Mahoney v. Vanwinkle*, 33 Id. 458; *Carey v. P. and C.*

Petroleum Co., 33 Id. 693; *Boggs v. Clark*, 37 Id. 238; *Taylor v. Castle*, 42 Id. 370; *Nickerson v. Cal. Stage Co.*, 10 Id. 521; *Caperton v. Schmidt*, 26 Id. 513.)

III. The bond sued on is a good bond. (*White v. Fratt*, 13 Cal. 524; *Jones v. Childs*, 8 Nev. 121.)

By the Court, LEONARD, J.:

On the sixteenth day of May, 1874, an action was pending in the district court of Lincoln county, wherein defendant John Roeder was plaintiff and one P. Guertin was defendant. Roeder caused a writ of attachment to be issued and delivered to one Travis, sheriff of the county, who attached about three hundred cords of wood, as the property of Guertin. Plaintiff served a written notice upon sheriff Travis, claiming the wood as his property, and demanding its return to him. Roeder required the sheriff to retain the property attached, and thereupon the defendants executed and delivered to him an indemnifying bond, of which the following is a copy, so far as its contents are important:

Know all men by these presents, that we, John Roeder, as principal, of Pioche, Lincoln county, Nevada, and W. C. Glissan and Louis Sultan, of the same place, as sureties, are held and firmly bound unto W. S. Travis, sheriff of said Lincoln county, * * * in the sum of one thousand five hundred dollars, * * * to be paid to the said sheriff or his * * * assigns, for which payment well and truly to be made, we bind ourselves, * * * jointly and severally, firmly by these presents.

Sealed with our seals, and dated this sixteenth day of May, 1874.

Whereas, under and by virtue of a writ of attachment, issued out of the district court of the seventh judicial district, Lincoln county, state of Nevada, in a certain action wherein the above bounden John Roeder is plaintiff, and P. Guertin is defendant, against said defendant, directed and delivered to said W. S. Travis, sheriff of the county and state aforesaid, the said sheriff was commanded to attach and safely keep all of the property of said defendant within his county not exempt from execution, or so much

Opinion of the Court—Leonard, J.

thereof as may be sufficient to satisfy the plaintiff's demand, amounting to seven hundred and four dollars United States gold coin, as therein stated; and the said sheriff did, thereupon, attach and take into his possession the following personal property, to wit: three hundred cords of wood, more or less; * * * and whereas, upon the taking of said goods and chattels, by virtue of the said writ, one Ambrose Gaudette claimed the said goods and chattels as his property, by a written notice; and whereas, the said plaintiff, notwithstanding said claim, requires the said sheriff to retain the said property under said writ of attachment and in his custody; Now, therefore, the condition of this obligation is such that if the said above bounden John Roeder, W. C. Glissan and Louis Sultan * * * shall well and truly indemnify and save harmless the said sheriff * * * of and from all damages, expenses, costs and charges, and against all loss and liability which he, the said sheriff, his heirs * * * or assigns shall sustain, or in any wise be put to, for or by reason of said attachment, seizing, levying, taking or retaining by the said sheriff in his custody under said attachment, of the said property claimed as aforesaid, then the above obligation to be null and void; otherwise to remain in full force and effect.

Signed, sealed and delivered in presence of D. Corson.

JOHN ROEDER, [Seal.]

WM. C. GLISSAN, [Seal.]

LOUIS SULTAN. [Seal.]

The sureties justified in proper form. After receiving the above undertaking, the sheriff held the property under the writ until about June 4, 1874, when it was sold to satisfy the judgment obtained in the action wherein it had been attached.

On or about May 21, 1874, plaintiff Gaudette brought suit in said court against Travis to recover the same wood, or its value if the property could not be had, and obtained judgment for its return or its value, to wit: nine hundred dollars, and four hundred and twenty-five dollars and twenty-five cents costs. Travis appealed to this court (11

Opinion of the Court—Leonard, J.

Nev. 149), wherein the judgment was affirmed. Thereafter execution upon said judgment was issued about December 20, 1876, and placed in the hands of the then sheriff of Lincoln county for service, who returned the execution with his return indorsed thereon, to the effect that said wood could not be found, and that Travis, defendant therein, had no property within the county. The execution was returned wholly unsatisfied, and no part of said judgment or costs has been paid. Plaintiff alleges that on the fifth day of June, 1877, Travis, for a valuable consideration, sold, assigned and delivered said undertaking and all his right, title and interest therein to him, and that plaintiff now owns and holds the same. The allegations of the complaint last stated only are denied by the answer. On the sixteenth day of June, 1877, plaintiff demanded of defendants payment of the judgment and costs in the case of *Gaudette v. Travis*. No part having been paid, this action was commenced on the eighteenth of June, 1877, to recover the amount of the penalty stated in the undertaking, fifteen hundred dollars. The cause was tried by the court and judgment rendered for plaintiff for the full amount claimed in the complaint, besides costs. This appeal is taken from that judgment and the order denying defendants' motion for a new trial.

Several points urged in the court below on motion for a new trial were waived at the oral argument in this court, and they will not be considered, although they are re-stated in one of the briefs of counsel for appellant. In the first place, they are destitute of merit; and, second, they were confessed to be so at the argument, as before stated.

The first assignment of error is the order of the court overruling defendants' general demurrer to the complaint.

All the facts first stated herein, with one exception, to and including defendants' failure to satisfy plaintiff's judgment against Travis, were amply set out in the complaint before amendment; and the only change thereafter made was the insertion of an allegation at the trial, that Travis, as sheriff, sold the wood under an execution issued in said case of *Roeder v. Guertin*, on or about June 3, 1874, which allegation was not denied by defendants.

Opinion of the Court—Leonard, J.

It is urged by counsel for appellants in another part of their briefs, that the consideration for the undertaking was, that Travis, as sheriff, should retain the property under the writ of attachment. Before and after amendment it was alleged in the complaint, "that Travis, as such sheriff, in obedience to the requirements of said Roeder, * * did retain and keep in his possession said personal property, under and by virtue of said writ of attachment." In other words, at the time the demurrer was overruled, the complaint showed precisely what defendants' counsel now claim is necessary, before their clients can be held liable upon the undertaking. The court did not err in overruling the demurrer.

But it is said that the complaint did not state a cause of action after amendment, and that the judgment is not sustained by the pleadings and evidence, because the consideration for, and the condition of, the undertaking was that Sheriff Travis should retain the property under the attachment, while the complaint after amendment contained the allegation, and the evidence showed, that he did not so retain it, but did dispose of it without the consent of the sureties Glissan and Sultan. These objections can be considered together. The evidence on the part of plaintiff, as well as the allegations of the complaint after amendment, not denied by defendants, showed that the sheriff, Travis, retained the property attached until after Roeder obtained judgment against Guertin, when he sold it under execution issued in that case, for the benefit of Roeder. The rule undoubtedly is, that the liability of a surety cannot be extended beyond the terms of his contract, and that, if without his consent the contract is changed he is released.

But it is also true that in ascertaining the terms of a contract which is made under and in respect to a law, the law itself becomes a part of the contract. Let us apply these rules to the case in hand. After receiving written notice from Gaudette that the latter claimed the wood and demanded its release from attachment, Travis had the right to demand and receive indemnity, or release the levy. (C. L. 2968; Freeman on Executions, sec. 275; Herman on Executions, sec. 154.)

The process of attachment creates a lien upon property of the debtor that is seized thereunder, and it is thereafter held as security for the satisfaction of any judgment that may be obtained by the plaintiff in the action. (Sec. 123, Civ. Prac. Act.) But the levy may be abandoned by the direct act of the officer in giving up the property when his reasonable demand for indemnity has been refused.

Under section 135 of the civil practice act, if judgment is recovered by the plaintiff after attachment, the sheriff is required to "satisfy the same out of the property attached by him which has not been delivered to the defendant." At the time this undertaking was given, defendants knew, that if the property attached was not released before judgment, it would be the sheriff's official duty to sell the same in satisfaction of such judgment as Roeder might obtain, unless otherwise ordered by the judgment-creditor. The only object Roeder had in causing the property to be attached was to apply it to the satisfaction of any judgment he might obtain, and neither of the defendants could have had any other object in giving the undertaking. The statute permits no other object. So, the defendants Glissan and Sultan knew that the property was liable, at least, to be sold under execution, if Roeder should obtain judgment, and that it might not be "retained" by the sheriff under the writ of attachment after judgment. They had no reason to expect, nor did they expect, it would be longer kept under that writ. Under the circumstances and for the purposes stated they gave the undertaking, requiring the sheriff to retain the property under the writ of attachment; that is, to hold it as security for any judgment Roeder might obtain, and thereby continue the lien already secured, to the end that, after judgment, it might be sold in satisfaction thereof, as required by law.

It was retained under the writ just as long as the statute permitted, under and in view of which defendants contracted. One other assignment, only, requires consideration.

It is alleged in the answer, "that on the eleventh day of March, 1875, a judgment was rendered and entered in said

Opinion of the Court—Leonard, J.

district court in favor of said plaintiff, Ambrose Gaudette, and against these defendants, John Roeder, William C. Glissan and Louis Sultan, and upon the same subject-matter embraced in this action, and upon which the complaint of plaintiff in this action is based; and that said judgment now remains of record in said court, and has never been reversed or set aside, vacated or discharged, as will appear by the records of said court, reference to which is hereby made."

The facts admitted by the answer and proven upon the trial in support of these allegations were as follows:

On the twenty-seventh day of February, 1875, plaintiff Gaudette recovered judgment in said court against Travis for a return of the wood attached in the case of *Roeder v. Guertin*, and described in the undertaking in question, or for its value if a return could not be had, found to be nine hundred dollars, besides costs taxed at four hundred twenty-five dollars and twenty-five cents.

On the sixth day of March, 1875, evidently intending to proceed under section 591 of the practice act (C. L. 1652), Travis, by his attorneys, gave written notice to defendants, Roeder, Glissan and Sultan, "that on the twenty-seventh day of February, 1875, Gaudette recovered judgment in said court against Travis, in the cause entitled *Gaudette v. Travis*, for the sum of nine hundred dollars, and four hundred twenty-five dollars and twenty-five cents costs, and that Travis, by his attorneys, on the eleventh day of March, 1875, at the court-room * * * would move the court to order judgment in said cause to be entered against said Roeder, Glissan and Sultan, and each of them, for the amount of said judgment and costs."

On the eleventh of March, after receiving testimony and hearing argument, the court ordered that judgment in said cause of *Gaudette v. Travis* be entered against Roeder, Glissan and Sultan. The persons last named were substituted for Travis, and the judgment now pleaded in bar to this action was entered in the following form:

"*Ambrose Gaudette v. William C. Glissan, Louis Sultan and John Roeder.* Whereupon * * * it is ordered and

adjudged that said plaintiff do have return from said Louis Sultan, William C. Glissan and John Roeder of * * * cords of wood, or in case a return cannot be had, that said plaintiff do have and recover of and from said Sultan, Roeder and Glissan its value, to wit, nine hundred dollars, * * * and all costs of said action, taxed at four hundred and twenty-five dollars and twenty-five cents, and the costs of this motion, taxed at twenty-eight dollars and fifty cents."

This judgment was docketed in the same form—Gaudette was entered as "judgment-creditor," and Roeder, Glissan and Sultan as judgment-debtors."

On the twenty-second day of July, 1876, after notice, defendants Roeder, Glissan and Sultan, by their attorney, moved for a perpetual stay of execution in the case wherein they had been substituted as defendants in place of Travis, on the grounds, in part, that the so-called judgment against them was absolutely void, because the record of the proceedings showed that Gaudette was not a party thereto, either as plaintiff or defendant; that Gaudette was not the actor in said proceedings; neither was he served with any summons, notice or process known to the law to bring him within the jurisdiction of said court; that Gaudette was a stranger to said proceedings, and did not, by counsel or otherwise, appear therein; that Gaudette was not, and had never been, sheriff, either *de jure* or *de facto*, of Lincoln county; that the statutory provisions under which said pretended judgment was obtained could only be invoked by a sheriff." * * * The court agreed with the views then entertained by counsel for defendants, and perpetually stayed execution in that case. On the same day, July 22, but whether before or after the order staying execution we are not advised, Travis, by his attorneys, moved the court for leave to amend that judgment by substituting Travis in place of Gaudette, alleging mistake. The motion was denied by the court on a subsequent day.

It is unnecessary to decide whether or not, under the circumstances stated, defendants are estopped by the record, to deny the validity of plaintiff's judgment against Travis, or to set up the substituted judgment in bar; for the reason

Opinion of the Court—Leonard, J.

that the so-called judgment last mentioned is plainly absolutely void, and has never been anything else. This appears upon the face of the records introduced in evidence by the defendants themselves, as well as by facts admitted on both sides, to be true. In the first place, the statute did not provide for or permit the substitution of defendants in place of Travis in the original judgment. It only permitted the court, after notice to the sureties, to order a separate judgment against them in favor of the sheriff, for an amount equal to that recovered against him by Gaudette. This special statutory proceeding is provided for the sheriff's protection, but nothing could be done under it to affect the judgment recovered by Gaudette. He had no interest in the proceeding, and could not be injured or benefited thereby. The judgment obtained by him was against Travis, and without his consent or knowledge, so far as the record shows, and without any authority of law so to do, the defendants in this action were substituted for his judgment-debtor. Such substitution, if legal and with Gaudette's consent, might be beneficial to him in this suit; but were such the case, the same result would follow, for it was unwarranted by law, and is not voidable merely, but is absolutely void, nor did it in any manner affect the judgment recovered by Gaudette against Travis.

The court had no jurisdiction over the subject-matter of such a proceeding, unknown at common law and not permitted by statute. It had no more power to substitute the sureties for Travis than it had to insert the names of other persons. For such a purpose, it had no jurisdiction over the persons of the defendants, and over Gaudette it had none for any purpose. The judgment pleaded in bar can bar no proceeding nor bind any person. (Freeman on Judgments, secs. 117, 118.)

The judgment and order appealed from are affirmed.

Argument for Respondents.

[No. 899.]

P. W. JOHNSON AND E. REINHART, APPELLANTS, v.
BADGER MILL AND MINING COMPANY ET AL.,
RESPONDENTS.

ACKNOWLEDGMENT, FORM OF.—The law does not require that the exact form of the certificate given in the statute shall be followed. A substantial compliance therewith is sufficient.

IDEM—OMISSION OF WORD "BE."—The omission of the word "be" in the sentence "H. G. Rollins to the president of the Badger mill and mining company;" *Held*, to be a clerical error that should be disregarded; that the certificate when read entire sufficiently identifies Rollins as the person who signed and acknowledged the instrument.

IDEM—ACTUAL KNOWLEDGE OF DEED.—A defective acknowledgment cannot be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage.

FORECLOSURE OF MORTGAGE—LIEN CLAIMANTS—DECREE.—In a suit to foreclose a mortgage where the lien claimants are made parties to the suit, the court should determine, in its decree, the relative rights of the plaintiff and the several lien claimants.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts are sufficiently stated in the opinion.

Lewis & Deal, for Appellants.

I. The plaintiff had the right to have the *status* of the several liens determined in this action.

II. The court erred in holding that actual notice by the lien-holders of the existence of plaintiff's mortgage was not sufficient. (2 Hill on Real Prop. [4 ed.], 676; 3 Washburne on Real Prop. 282 *et seq.*; Stat. 1875, 122.)

III. There was no defect in the acknowledgment. An acknowledgment should be liberally construed. (2 Hill on Real Prop. [4 ed.], 678; 8 Wallace, 526-28 *et seq.*; 68 Ill. 426.)

Geo. P. Harding, for Respondents.

I. Nothing will be presumed in favor of an acknowledgment. (U. S. Digest, 1876, 246, sec. 34.) The acknowledgment in this case is radically defective. (*Wolf v. Fogarty*,

Opinion of the Court—Hawley, C. J.

6 Cal. 224; *Kelsey v. Dunlap*, 7 Id. 162; *Fogarty v. Finley*, 10 Id. 239; Proffatt on Notaries, pp. 28, 31, sec. 29-32; Comp. L. Nev. sec. 234-46.)

II. The offer set out in the bill of exceptions to prove actual notice of the existence of the mortgage is too vague. If the notice was after work and labor done and material furnished, the proof of it would have been immaterial. The presumption, therefore, is that the offer was properly refused. (*Morris v. McCoy*, 7 Nev. 399; 17 Tex. 62, 245; *Sessions v. Reynolds*, 7 S. & M. 130; *Fowler v. Lee*, 4 Munf. 373.)

By the Court, HAWLEY, C. J.:

The plaintiffs obtained a decree for the foreclosure of a mortgage against the property of the defendant, the Badger mill and mining company. They appealed from the judgment and claim that the court erred in refusing to admit their mortgage in evidence, as against certain lien-holders, who were made parties defendants in order that their rights might be heard and determined in this action; and that, under the issues raised by the pleadings, it was the duty of the court to determine the *status* of the several liens held by the respective parties. The mortgage in question was executed by H. G. Rollins, president, and O. H. Spencer, secretary, of the Badger mill and mining company.

The certificate of acknowledgment, which was objected to as insufficient, reads as follows: "State of California, city and county of San Francisco, ss. On this sixth day of October, A. D., 1875, before me, A. S. Gould, a commissioner of deeds for the state of Nevada, duly appointed, commissioned and sworn, residing in said city and county, personally appeared H. G. Rollins, known to me to be the president of the Badger mill and mining company, and O. H. Spencer, known to me to be the secretary of the Badger mill and mining company, the corporation that executed the foregoing instrument, and acknowledged to me that said corporation executed the same freely and voluntarily for the uses and purposes therein mentioned, and affixed thereto the corporate seal of said corporation," etc.

Under the laws of this state it is essential that the certificate should show the fact of the acknowledgement and the identity of the person. (1 Comp. Laws, 235; *Henderson v. Grewell*, 8 Cal. 581.)

The form of the certificate is, in several respects, irregular. The law, however, does not require that the exact form of the certificate given in the statute shall be followed. All that is necessary is a substantial compliance with the statute. (*Morse et al. v. Clayton*, 13 Smedes & Marshall, 381; *Chandler v. Spears*, 22 Vt. 407; *Troup v. Haight*, 1 Hopk. Ch. 244; *West Point Iron Company v. Reymert*, 45 N. Y. 706; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Calumet and Chicago Canal and Dock Company v. Russell*, 68 Ills. 426; *Deery v. Cray*, 5 Wal. 807; *Carpenter v. Dexter*, 8 Wal. 526.)

The only objection urged by the respondents, and the only one that we shall consider, is as to the identity of the person. It is claimed that the certificate is defective in failing to state that Rollins was known to the commissioner to be the president of the corporation, or, in other words, to be the person described in and who executed the mortgage. We are of opinion that it is apparent on the face of the certificate that the omission complained of is of the word "be," and that it is a clerical error.

This case is not analogous to that of *Wolf v. Fogarty*, 6 Cal. 224, and other cases, where the omission was of the word "known." Such an omission in the certificate has usually been held fatal, because it partakes of the substance required by the statute. (Proffatt on Notaries, sec. 32, and authorities there cited.) In *Wolf v. Fogarty* it was said that the omission might as well be supplied "by claiming or representing himself, as by known or proved."

In *Tully v. Davis* the court said it was "in fact as easy to fill the blank so as to make the certificate and acknowledgment void, as to so fill it as to make them good." (30 Ills. 108.)

But in the present case, when the entire certificate is considered, it is manifest that the omission of the word "be" is a mere clerical error and ought to be disregarded. In our opinion, no other sensible interpretation can be given to

Opinion of the Court—Hawley, C. J.

the certificate. No blank space is left in the certificate to be filled up. The commissioner uses the same words with reference to the secretary as the president with the addition of the word "be" properly inserted. We think the certificate is sufficient to identify Rollins as the person who signed the mortgage as president of the Badger mill and mining company.

In *Scharfenburg v. Bishop*, *supra*, the word "appeared" was omitted and the court held that the omission "was manifestly a mere clerical error."

In *Chandler v. Spear*, *supra*, in the body of the deed one of the grantors was described as Richard G. Bailey, and the deed was signed R. G. Bailey. The certificate stated that "Oliver Hale and Daniel Brown, Richard G. personally appeared and acknowledged this instrument, by them sealed and subscribed," etc. The court said: "Although the name 'Bailey' is omitted in the acknowledgment, yet the statement that Richard G., who executed the instrument, acknowledged it, does, we think, render it sufficiently certain that it was acknowledged by Richard G. Bailey, the grantor."

In *Calumet and Chicago Canal and Dock Co. v. Russell*, *supra*, the acknowledgment was of a married woman, and under the laws of Illinois it was essential that the contents and meaning of the instrument should be explained to her. The certificate used the words "the contents and meaning of my husband." The supreme court said that the certificate must be regarded in a common sense view; all its parts must be taken together and a meaning given to it which it is qualified to bear. The court, after discussing the question at great length, and reviewing numerous authorities, came to the conclusion that the case showed "to the satisfaction of the most inexperienced, on taking the entire certificate into consideration, that the contents of the deed were made known to her," and held the certificate to be sufficient to impart notice."

The conclusions almost universally arrived at, in the various cases we have examined, is that as long as the substance is preserved mere technical objections will not be

avored. In *Morse v. Clayton*, *supra*, the court say: "These certificates should be liberally construed; that it is neither the duty nor the inclination of courts, where substance is found, to jeopardize titles in any way depending upon them, by severe criticisms, upon their language."

Equally clear and emphatic is the language of the supreme court of the United States in *Carpenter v. Dexter*: "In aid of the certificate reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections."

From the views already expressed it is unnecessary to determine whether the offer of plaintiffs to prove actual knowledge upon the part of the several lien claimants of the existence of the mortgage was sufficiently explicit to show that the court erred in refusing to allow the evidence.

The rule is certainly well settled that a defective acknowledgment cannot be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage. (3 Hilliard on Real Property, 676, sec. 36 and authorities there cited.)

The decree of foreclosure against the Badger mill and mining company is correct as far as it goes, and is affirmed; but it was the duty of the court, in this action, to proceed and determine the relative rights of plaintiffs and the lien claimants, and to decide whether the lien of plaintiff's mortgage was prior to, or subsequent to, the other liens, and to enter such a judgment and decree in that respect as the evidence might warrant.

The action of the court in refusing to adjudicate that question amounted to a judgment of dismissal, without prejudice, in favor of the lien claimants, and was erroneous.

The cause is therefore remanded for further proceedings.

LEONARD, J., having been of counsel in the court below, did not participate in the foregoing decision.

Argument for Respondent.

[No. 870.]

B. F. HIGGS AND A. A. TRAVIS, RESPONDENTS, v. T. C. HANSON, ADMINISTRATOR OF A. L. PAGE, DECEASED, IMPEADED WITH ANOTHER, APPELLANT.

SECTION 379 OF THE CIVIL PRACTICE ACT—COMPETENCY OF WITNESS—INCIDENTAL OR MATERIAL FACTS.—Where a witness is disqualified, under the provisions of section 379 of the civil practice act, he is a competent witness to testify to incidental and preliminary matters addressed solely to the judge; but cannot testify to any of the issues raised by the pleadings.

IDEM—AGENCY—DRAWING CHECKS.—The plaintiff was permitted to testify that he was the agent of defendant's intestate during his life-time, and was authorized by him to draw certain bank checks: *Held*, that the agency of Higgs was a material fact to be decided by the jury, and that the court erred in admitting the testimony, the witness Higgs not being a competent witness, under the provisions of section 379.

PLEADINGS—PARTIES HAVING NO JOINT INTEREST AS PLAINTIFFS.—In a suit to foreclose a mortgage, it appearing that plaintiffs had no joint or common interest in the money advanced upon the mortgage: *Held*, that these facts should have been alleged in the complaint, and that the decree should be made to conform therewith.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts sufficiently appear in the opinion.

Ellis & King, for Appellants.

I. The court erred in admitting the testimony of the witness Higgs as to the existence or fact of his agency, and as to his authority to draw the bank checks in question. (Civ. Pr. sec. 379; Stat. 1869, 255; *Roney v. Buckland*, 4 Nev. 45.)

II. The complaint alleges a joint demand. In such a case, there must be a joint demand or claim proved. (Barbour on Parties, 21-4; Civ. Pr. sec. 14; Laws 1869, p. 197; *Riley v. Marshall*, 5 Ala. 682; *Lombard v. Cobb*, 14 Me. 222; *Doremus v. Seldon*, 19 Johns. 213; *Parker v. Leek*, 1 Stew. 523; *Prescott v. Newell*, 39 Vt. 82; *Brent v. Firebaugh*, 12 B. Mon. 87; *Jones v. Eltheridge*, 6 Porter, 208.

R. M. Clarke, for Respondent.

The transaction testified to by Higgs was the payment or

Opinion of the Court—Beatty, J.

redemption of the checks, not the making of them. His evidence was upon a preliminary matter, and was competent. (*Bagley v. Eaton*, 10 Cal. 126; *Landis v. Turner*, 14 Id. 573.)

By the Court, BEATTY, J.:

Defendant's intestate, during his life-time, executed and delivered to the plaintiffs a mortgage of certain real estate to secure the payment of a promissory note for two thousand dollars, and to secure the repayment to the mortgagees of all other moneys which they might advance for specified purposes on account of the mortgagor, not exceeding five thousand dollars, inclusive of the note. This is a suit to foreclose the mortgage, and the appeal is from the judgment and an order overruling a motion for a new trial.

The grounds of the motion were errors of law occurring at the trial, and insufficiency of the evidence to justify the verdict.

The first specification of error in the rulings of the court at the trial is, that the court erred in permitting the plaintiff Higgs to testify that he was the agent of defendant's intestate during his life-time, and authorized by him to draw certain bank checks, which were introduced in evidence. The defendant objected to this testimony at the time it was offered, on the ground that he, the defendant, the opposite party to the action, was the representative of a deceased person.

It is admitted that Higgs was disqualified as a witness by section 379 of the practice act, unless he was a competent witness as to the facts testified to by him, before and independent of the statute which permits parties to testify in their own behalf. (Pr. Act, sec. 376 *et seq.*) But it is claimed that his testimony related exclusively to an incidental and preliminary matter addressed solely to the judges, and not to the issues raised by the pleadings. In support of this proposition, we are referred to cases in which parties were permitted, before the statute, to prove the loss or destruction of written instruments by way of foundation for the introduction of secondary evidence of their contents, and cases

Opinion of the Court—Beatty, J.

in which parties by their own testimony laid the foundation for the admission of their books of account. In our opinion these cases are not in point. The testimony of Higgs related directly to one of the issues in the case. It was material to show that Page drew the checks; the mode of showing it was by proof of the authority of Higgs to draw them as his agent; the agency of Higgs was a fact to be decided by the jury (supposing a jury to have been sitting in the case) and not as a preliminary matter to be decided by the judge as such. This, according to the cases referred to, is the test of the competency of a party as a witness before the statute. He could only testify to incidental and preliminary matters which were to be decided by the judge, and could not testify to facts that were to be found by the jury.

The court erred in admitting the testimony of Higgs against the objection of appellant, and for this error the judgment and order appealed from must be reversed. The findings of fact are also against the evidence in one or two particulars, which materially affect the judgment.

The uncontradicted testimony of Higgs is that eight hundred and fifty dollars and fifty-two cents of the amount claimed for advances under the mortgage was due to him individually before the execution of the mortgage, and if so, it is not secured by the mortgage, which by its terms includes only money to be advanced after the date of its execution.

The testimony of both plaintiffs, moreover, is to the effect that they had no joint or common interest in the money advanced upon the mortgage. If this is so the complaint ought to be amended in accordance with the facts, and the decree made to conform therewith. It should order a sale of the premises and the application of the proceeds, first to the payment of the note, and next to the payment of the sums due to the plaintiffs severally, with several judgments in their favor for any deficiency in the amounts to which they are severally entitled.

Judgment and order reversed and cause remanded.

Statement of Facts.

[No. 856.]

**J. E. JONES & CO., RESPONDENTS, v. PACIFIC WOOD,
LUMBER AND FLUME COMPANY, APPELLANT.**

INLAND BILLS OF EXCHANGE NOT AN ASSIGNMENT OF FUNDS.—An order in the form of an inland bill of exchange not upon any particular fund is not, before acceptance, an assignment, and does not create any lien in favor of the holder upon funds of the drawer in the hands of the drawee.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Instructions 2 and 3 offered by defendant and referred to in the opinion, read as follows: No. 2. "If the jury believe that prior to the making and presentment to D. H. Jones as agent for the defendant, of the order of July 21, for ten thousand dollars, it had been agreed between this defendant by said Jones as agent of the defendant, and M. Pettinelli & Co., that the defendant should guarantee to pay the workmen of said Pettinelli & Co., the amount due from said firm, and said Jones as agent for the defendant did guarantee and pay said workmen in pursuance of said agreement, then the said order in favor of the plaintiffs, even if good in other respects, would be postponed to this agreement, and the defendant would not be liable to pay the orders except from the surplus of funds remaining after the payment of the workmen. If the agreement embraced not only the amount due the workmen, at the time it was made, but also the amount to become due, then, for future labor, the defendant was not liable to pay the order until the workmen had been paid in full for the labor performed after, as well as before, the making of the agreement."

No. 3. "If the written order to pay the workmen, dated July 20, introduced by defendant, was executed by M. Pettinelli & Co. and delivered to D. H. Jones as agent of defendant prior to the presentment of said Jones' order for ten thousand dollars, of July 21, in favor of J. E. Jones & Co., and if at the time of the execution and delivery of said first named order, D. H. Jones as agent for the defendant accepted the same verbally, and agreed with Pettinelli &

Argument for Respondents.

Pardini that he would pay the workmen as they requested, then the defendant had the right and was bound to pay said workmen before paying said orders to Jones & Co., and Jones & Co. could only demand on their order the surplus due Pettinelli & Co. after paying the workmen in full."

The facts are stated in the opinion.

C. J. Hillyer, for Appellants.

I. The demurrer to the complaint should have been sustained. The orders set forth in the complaint containing no reference to any special fund, but being simple bills of exchange in the ordinary commercial form, did not, until accepted, operate as an assignment of, or create any lien upon, funds of the drawer in the hands of the drawee. (*Mandeville v. Welch*, 5 Wheat. 277; *Luff v. Pope*, 5 Hill. 413; affirmed in Court of Errors, 7 Hill. 577; *New York etc. Bank v. Gibson*, 5 Duer, 585; *Gibson v. Cook*, 20 Pick. 15; *Copperthwaite v. Sheffield*, 1 Sand. 449; *Marine etc. Bank v. Jauncey*, 3 Id. 257; *Harris v. Clark*, 3 Com. 114; *Phillipps v. Stagg*, 2 Eds. Ch. 109; Id. 437; *Row v. Dawson*, 1 Vesey, Sr. 331; *Yeats v. Groves*, 1 Vesey, Jr., 280; *Watson v. Duke of W.*, 1 R. & M. 602; 1 Parsons on Notes and Bills, 331; Drake on Attachment, sec. 611.) The court erred in refusing the first, second and third instructions offered by defendant.

R. M. Clarke, for Respondents.

I. Although the orders in question are in form ordinary bills of exchange, they were in fact drawn upon the fund arising from the wood contract, and so operated to assign so much of said fund as was due and was specified in the orders. (1 Keyes, 193; *Lewis v. Berry*, 64 Barb. 593; *Conway v. Cutting*, 51 N. H. 409.)

II. The orders were assented to, made at the instance of, and were agreed to be paid by, appellant, and for this reason the authorities cited for appellant are not in point.

III. The orders in question did not operate to "split" one cause of action into many, because, under the contract, P. & P. were entitled to advances whenever "proper,"

Opinion of the Court—Leonard, J.

which advances, when “proper,” were always due and were separable from the contract price of the wood. But in this state where but one form of action exists, where law and equity are administered in the same forum, and where the assignee and real party in interest must sue, an assignment of part only of an entire demand is valid and may be enforced. (*Grain v. Aldrich*, 38 Cal. 514.)

By the Court, LEONARD, J.:

In August, 1875, defendant entered into a written contract with M. Pettinelli and M. Pardini, partners and doing business under the firm name of M. Pettinelli & Co., whereby P. & Co. agreed, prior to July 1, 1876, to cut, manufacture and pile for defendant, thirty thousand cords of fire wood of a stipulated length, upon lands of defendant, selected and agreed upon by both parties. P. & Co. also agreed to cut all trees suitable for mill purposes into saw-logs of certain length and diameter, or pay all damages for failure so to do, and to “clear up” the land whereon the wood was cut.

Defendant agreed to pay P. & Co. therefor ninety cents a thousand for cutting the logs, and two and one eighth dollars per cord for the wood so cut and piled. Defendant was to measure the wood and its measurement was to be taken as correct. Defendant agreed to make such advancements, in the meantime, as might be “proper” for P. & Co. to carry out their contract.

Under the contract stated, P. & Co. cut between eight and nine hundred cords in the fall of 1875, when they ceased work until April, 1876, at which time they resumed and continued until about the first of September, 1876, when they ceased work altogether; having cut, according to defendant's books, a little less than fifteen thousand cords of wood, and about five hundred and eighty-four thousand two hundred and twenty-four feet of logs. Defendant paid to P. & Co., or on their account, considerable sums of money from time to time, the first payment having been in November, 1875; and thereafter the record shows payments each month, except January and July, 1876. P. & Co. cut the

Opinion of the Court—Leonard, J.

wood partly by men employed by the day and partly by sub-contractors.

It also appears that on or about the seventeenth or eighteenth of July, 1876, P. & Co. became involved, and were unable to pay their laborers, who were dissatisfied and threatened to stop work if they were not paid or their wages secured. They proposed to keep possession of the wood that had not been measured and accepted by defendant, until they were paid. Under such circumstances, D. H. Jones, defendant's superintendent, made a verbal agreement with P. & Co., on the eighteenth of July, with the consent and to the satisfaction of the laborers and sub-contractors, or at least a large part of them, to the effect that defendant should pay the men for their labor out of the first moneys due to P. & Co., under the wood contract. Under this arrangement the men continued their work. In accordance with the verbal agreement stated, Pettinelli & Pardini, on the morning of July 21, and prior to the drawing of the ten thousand dollar order hereinafter mentioned, made and delivered to defendant's superintendent a written order, signed by both, directing the superintendent to retain from the first moneys due to P. & Co. on their contract, the amount due their men for work done on wood and logs by the terms of their contract, the balance, after paying the men, to be held subject to their order.

The superintendent verbally accepted the order and agreed to pay the men accordingly. He commenced to pay the laborers about the first part of August, generally upon statements from P. & Co., showing the amount due, and continued to do so until P. & Co. discontinued work. Defendant paid the men in full, and from the testimony of the superintendent and the books of defendant, it appears that, including the amount paid the men, P. & Co. have been paid the whole amount coming to them under their contract, except four hundred and eighty-nine dollars, for which amount defendant is liable on account of legal garnishments in suits against P. & Co.

Plaintiffs did not make any advancements, or pay any sums of money to P. & Co. after the twenty-first of July,

nor did defendant pay any sum to or for P. & Co. on their contract, after that date, except the amounts due the men as before stated, and certain sums for which defendant was held as garnishee, the latter not being questioned by plaintiffs. During the continuance of work under the contract, between the first part of June and the twenty-first of July, 1876, P. & Co. represented to plaintiffs, who are bankers in Reno, that defendant was indebted to them on their contract in a large sum—about ten or twelve thousand dollars—and thereupon plaintiffs honored their checks from time to time, taking orders or drafts upon defendant as security for money advanced or to be advanced.

On the sixth day of June, 1876, when P. & Co. were indebted to plaintiffs in about the sum of one thousand three hundred dollars, for advances, the former made and delivered to the latter an order of which the following is a copy:

RENO, June 6, 1876.

“1,000. Pay to the order of J. E. Jones & Co. one thousand dollars in United States gold coin, value received, and charge the same to the account of

M. PETTINELLI & Co.

To the Pacific Wood, Lumber and Flume Company, Virginia City, Nev.”

On the same or following day, plaintiffs forwarded the order to the defendant with the request that the latter should “hold it against P. & Co. for plaintiffs’ benefit, that in case any suit should be brought against P. & Co., the order might operate as an assignment to the extent of one thousand dollars.”

On the sixteenth of July, 1876, defendant’s superintendent returned the order to plaintiffs with a letter wherein he said: “The inclosed draft I find among the papers of the company. To avoid any question (as) to Pardini’s authority to draw in this way, I return it to you for proper signature (P. & P.), which please get, and if you wish, will hold him (them) for payment from any balance due them in settlement and completion of the contract.” This draft was returned by the plaintiffs to P. & Co. on the twenty-first of July.

Opinion of the Court—Leonard, J.

On the tenth day of June, 1876, when P. & Co. were indebted to plaintiffs in the sum of two thousand two hundred dollars for advances, the former made and delivered to the latter an order upon defendant, in the same form, for six thousand dollars. This included two thousand five hundred dollars due from P. & Co. to one Mayberry, and the balance was intended to secure plaintiffs for advances made and to be made. Mayberry presented the order to defendant on the tenth of June for acceptance and payment. Defendant indorsed its written acceptance for two thousand five hundred dollars, and paid that amount to Mayberry, who receipted therefor in the name of J. E. Jones & Co. On the nineteenth of June defendant accepted this order for the balance, three thousand five hundred dollars, which was paid to plaintiffs September 13, 1876.

On the sixth of July, 1876, plaintiffs, for the same purpose, received a third order from P. & Co., in the same form, for three thousand dollars, when P. & Co. owed plaintiffs four thousand and seventy-five dollars—less the acceptance of three thousand five hundred dollars, before mentioned. This order was returned by defendant without acceptance, and with the order for one thousand dollars was given up by plaintiffs to P. & Co. July 21. On the twenty-first of July, when P. & Co. owed plaintiffs about six thousand five hundred dollars, less the acceptance of June 19 for three thousand five hundred dollars, and at the time that the one thousand dollar and three thousand dollar orders were returned by plaintiffs to P. & Co., the latter gave plaintiffs a fourth order for ten thousand dollars, to cover and secure the entire indebtedness due from P. & Co. to plaintiffs, further advances, and some debts due to other parties. Plaintiffs were not to be responsible to those last named, unless this order was paid. Defendant had notice of the different orders named soon after they were drawn, but none were accepted except the one for six thousand dollars, which was paid, as before stated, before the commencement of this action. Defendant had no notice of the ten thousand dollar order until after its agreement to pay P. & Co.'s indebtedness to the men, and there was no evidence

of an assignment, unless the drawing and delivery of the orders heretofore mentioned, and set out in the complaint, constituted such assignment. Plaintiffs admit that defendant's superintendent refused to accept the order for ten thousand dollars when they presented it on the twenty-first of July, but there is some conflict in the testimony as to what the superintendent said at the time of, and after, its presentation. Plaintiffs admitted on cross-examination that the superintendent did not bind himself to pay it, but that he, at least, conveyed to them the idea that there would be sufficient coming to P. & Co. to pay all their debts, while the superintendent testified, that he did not at any time, or in any manner, make any promise to pay any of the orders except the one for six thousand dollars; that the only promise was that he would do the best he could, and pay if there was enough coming, to P. & Co.; that he could not then say how the account stood; that so far as he had examined, the account looked better than he had anticipated, and he had no doubt there would be enough coming to P. & Co. to pay all their debts.

Three days after the ten thousand dollar order was presented, the superintendent wrote the plaintiffs as follows: "In relation to the account of Pettinelli & Pardini, I will say that there is not much doubt but that there is plenty due them in settlement to pay all their liabilities. Should anything occur to change my opinion in this respect, will let you know at once." About the middle of September he informed plaintiffs that the condition of P. & Co.'s account did not permit an acceptance of their orders; that P. & Co., after paying the workmen, had nothing coming to them. Until that time plaintiffs did not know of defendant's agreement to pay the men. It does not appear, however, that defendant could or should have given plaintiffs earlier information as to the state of P. & Co.'s account, or that plaintiffs were injured by the delay. Plaintiffs recovered judgment for three thousand dollars, the amount due to them from P. & Co., and this appeal is from the judgment and the order denying defendant's motion for a new trial. Appellant's assignments of error are numerous. Among others,

Opinion of the Court—Leonard, J.

that the court erred in refusing to sustain its demurrer to the complaint, and in denying its motion for a nonsuit. We shall not consider these assignments, but shall endeavor to state the principles governing the case, in an examination of the principal instructions to the jury given for plaintiffs, as well as those offered by defendant, but rejected by the court.

All the orders set out in the complaint are admitted to be, in form, inland bills of exchange, as they undoubtedly are. None of them, upon the face, were drawn upon any particular fund. It is alleged in the complaint that all except the one for ten thousand dollars were drawn for a part, only, of the amount due P. & Co. from defendant; and as to the last, the complaint does not show with certainty whether its amount, and the sum alleged to have been due from defendant to P. & Co., were or were not the same. The proof, however, shows that they were all drawn for a portion of the fund—that is to say, the amount coming to P. & Co. upon the wood contract. The case was tried upon the theory that the orders mentioned, operated as an equitable assignment *pro tanto* of the fund, or the money due P. & Co. from defendant under the contract, and that after notice of such orders, defendant was bound to the extent of the sums stated in the orders, or to such part as was due from defendant to the drawers, without acceptance or other promise to pay the same.

Appellant urges that the court erred in so interpreting the orders in question, and this assignment constitutes the most important subject presented for our consideration. It is not necessary at present to inquire whether, in case of an order upon a particular fund, it is indispensable that such order shall embrace the whole fund in order to operate as an assignment. That question may not arise in the decision of this case, if it be true, as we think it is, that an order in the form of an inland bill of exchange is not, before acceptance, an assignment, and does not create any lien in favor of the holder upon funds of the drawer in the hands of the drawee.

The following instructions, among others, were given to the jury on behalf of plaintiffs:

“No. 15. You are instructed that the fact that the defendant has paid Pettinelli & Pardini, or persons for them, all the money due upon the contract for cutting wood and logs, is no defense to this action, provided the jury believe, from the evidence, that before such payments, Pettinelli & Pardini had assigned to plaintiff, with the knowledge or consent of defendant, the sum claimed by plaintiffs and due to them.”

“No. 16. You are instructed that the orders set out in the complaint were an assignment of any sum or sums of money in the hands of the defendant, at the time due to Pettinelli & Pardini, and that if the defendant had notice of such orders at such time as said sums were due, then the orders bound the defendant to pay the plaintiffs the sums of money specified, and which were due.”

“No. 10. You are instructed that no promise made by the defendant to pay the sub-contractors or laborers of Pettinelli & Pardini, sums of money, which at the time and before the promise was due to them from Pettinelli & Pardini, was valid or binding upon the defendant, unless the promise or some note or memorandum thereof was in writing.”

“No. 13. You are instructed that the order or authorization directing or requiring D. H. Jones, superintendent, to retain and set aside from the money due Pettinelli & Pardini, on the contract, the sum due the men for work done on the wood and logs, was not an assignment in favor of the men of the sum, or any sum, of money then due from the defendant to Pettinelli & Pardini.”

“No. 14. You are instructed that the order of July 21, 1876, directing the defendant to pay the plaintiffs ten thousand dollars, was a revocation of any previous authorization to pay the men, except as to such sums due to Pettinelli & Pardini, as were in excess of ten thousand dollars.”

It will be noticed that, from these instructions, the jury could not fail to find for plaintiffs, if they found that defendant had notice of the orders, which it did not deny, and that, at the time the orders were presented, defendant was indebted to Pettinelli & Pardini, considering the amount paid to the laborers a portion of such indebtedness;

Opinion of the Court—Leonard, J.

because they were told by instructions fifteen and sixteen not only that payments to P. & Co., or on their behalf, were no defense, if P. & Co., with defendant's knowledge or consent, had previously assigned to plaintiffs, but also that the orders in question constituted such assignment, and if defendant had notice of the orders, it was bound to pay the sums therein specified and which were due.

By the tenth, they were told that they could not consider defendant's promise to pay the men, unless the promise or some note or memorandum thereof was in writing, and, as we have seen, defendant admitted that it was not in writing.

By the thirteenth, they were told that the order from P. & Co. to defendant, to pay the men was not an assignment in their favor of any sum due to P. & Co., and by the fourteenth that the order last mentioned was revoked by the ten thousand dollar order in favor of plaintiffs, except as to any excess of that sum due from defendant to P. & Co. So, we repeat, there was nothing left for the jury but to find a verdict for plaintiffs, if they found that defendant had notice, and that it was indebted to P. & Co. at the time of such notice.

Let us consult the books. In *Pars. on Notes and Bills*, Vol. 1, 331, the author says: "There may be some *dicta* to the effect that a bill of exchange is an assignment, but no case that we are aware of, with the exception of one (referring to *Corser v. Craig*, 1 Wash. C. C. R. 424), has held this doctrine in an unqualified way, and that case must be considered as overruled. The doctrine is well settled, that before acceptance, a negotiable bill for a part of the funds is no assignment, but becomes one on the drawee's signifying his assent by accepting the bill." The case of *Hutler v. Ellwanger*, 4 Lansing, 11, is similar to this in many respects. One Underhill had contracted with the defendant to erect certain houses for a specified sum, of which eighty per cent. was to be paid as the buildings progressed, on the architect's certificates given once in two weeks. Plaintiff did the mason work under a sub-contract with Underhill, and on the seventh day of December, 1869, there was due to him from Underhill, on account of such work, six hundred and

Opinion of the Court—Leonard, J.

seventy dollars. On that day Underhill drew and delivered to him an order as follows:

"\$670. Messrs. Ellwanger & Barry: Pay the bearer, Mr. Hutter, six hundred and seventy dollars, and charge my account for building on Cypress street, when work is accepted, it being amount due him on settlement.

"December 7, 1869.

R. W. UNDERHILL."

Within a few days thereafter plaintiff notified defendants of the order. More than a month prior to the date of Hutter's order, Underhill gave to the payees therein named two other orders upon Ellwanger & Barry, as follows:

"Please pay to M. F. Reynolds & Co. five hundred dollars on my contract for building houses, when the work is completed and accepted.

"Nov. 4, 1869.

R. W. UNDERHILL."

\$900. Pay to the order of Luther Gordon & Co., nine hundred dollars, at time of completion and acceptance of contract, value received, and charge to the account of

"Nov. 4, 1869.

R. W. UNDERHILL."

As in this case, Underhill had no other account with, or funds in the hands of, defendants than those arising from the contract for building, and defendants had due notice of the orders of November 4, prior to notification of plaintiff's order; Underhill's contract was completed and accepted December 12, 1869.

Defendants refused to accept plaintiff's order, but at the same time informed him that they had more than sufficient funds in their hands belonging to Underhill, on his contract, to pay it. They were mistaken, however, as to the amount of money due Underhill, the fact being, that the orders of November 4 covered the whole amount due Underhill, if both operated as an assignment of the building fund due from Ellwanger & Barry to Underhill. The court held that the order of November 4, for nine hundred dollars in favor of Gordon & Co., was not an assignment or appropriation of any part of the money due Underhill on his contract, but that the orders to Reynolds & Co., and to

Opinion of the Court—Leonard, J.

Hutter, assigned and appropriated those moneys *pro tanto*. We quote from the opinion: "The previous order of five hundred dollars, was clearly, upon its face, drawn upon that fund, and the principal question on which the case turns is, whether the order of nine hundred dollars is also an order upon the same fund and operates as an assignment of it *pro tanto* to the payees. * * * An ordinary bill of exchange, before acceptance, is no assignment of funds in the hands of the drawee, and gives the holder no lien, legal or equitable, upon such funds. (*Winter v. Drury*, 5 N. Y. 525.) This order would be a bill of exchange but for the fact, that the time of payment may never happen. An order drawn, payable out of a particular fund, is not a bill of exchange, although drawn in the form of a bill of exchange in other respects, but an order. It is, however, an assignment of the fund, or so much thereof as may be necessary to satisfy the amount ordered to be paid, and the drawer has no further control over it. * * * But it seems to be perfectly settled that, in order to constitute an assignment, the order must specify the particular fund upon which it is drawn."

The Marine and Fire Insur. Bank v. Jauncey et al., 3 Sandf. 258, was a suit in equity for the purpose of reaching certain funds received by the defendant Jauncey, arising from the sale of cotton delivered to, and sold by, him, on which plaintiff claimed to have an equitable lien, by reason of the facts stated in the opinion. The court says: * * * "It was next insisted that the bill or draft having been drawn against a consignment, was, of itself, an equitable assignment by the drawer of the property or its proceeds. This is certainly carrying the doctrine of equitable assignments very far, and is, in our judgment, entirely unsupported by authority. In the cases cited by counsel, and in all the other cases where an order has been held to be an equitable assignment of a particular fund, the fund has been specified in the order, and the party giving the order has thereby divested himself of all right to control the fund purporting to be assigned. The form of the assignment is immaterial, but these two ingredients are essential." And

Opinion of the Court—Leonard, J.

to the same effect, that the order must in terms specify the fund, although the drawer has but one fund in the hands of the drawee, in order to operate as an assignment, see *Hutler v. Ellwanger*, *supra*, 13. In *Cowperthwaite v. Sheffield*, 1 Sandf. 450, the court says: "The instruments here were ordinary bills of exchange. They did not, on their face, purport to be drawn on any particular fund, nor did they import that their payment was to depend upon any particular contingency. In *McMenomy v. Ferrers*, 3 Johns, 72, it was held that where an order is drawn for an entire fund, the fund being particularly stated in the order, it operates as an assignment of the fund. If these bills had been in the form of orders for the entire proceeds of the shipment of cotton, they might, after notice to the Kelleys, have operated as an assignment of such proceeds. But, then, they would not have possessed all the characteristics of bills of exchange. If, in such form, they could be negotiated, they would, on their face, convey information to every holder of the fund on which they were drawn, and which they carried with them."

In *Harris v. Clark*, 3 Comstock, 115, it is said: "The research of the counsel for the plaintiff has not enabled me to find a case where it has been held, that upon a negotiable bill of exchange the drawee has been made liable in equity to the holder of the bill, without his acceptance or assent. Such an instrument gives to the holder no lien upon the funds in the hands of the drawee." This language is quoted with approval in *Lunt v. Bank of North America*, 49 Barb. 229.

In *Chapman v. White*, 2 Seld. 416, the question was, whether a draft payable generally, operated as an assignment, either at law or in equity. The court held that the instrument was an ordinary bill of exchange, and that the drawee owed no duty to the holder until it was presented and accepted.

Winter v. Drury, 1 Seld. 525, was a suit in equity, and after announcing the same doctrine the court adds: "If the holder, by the receipt of the bill of exchange for value, acquired neither at law nor in equity, a lien upon the balance

Opinion of the Court—Leonard, J.

due to Clark (the drawer) and then remaining with the drawee, the drawer had the right to dispose of it at his pleasure. If intermediate the time of procuring the bill to be discounted, and its presentation to Furness, Brindley & Co. (drawees) the drawer himself had obtained the two hundred and fifty dollars from his correspondent, the plaintiff could not have maintained an action against Clark for the sum thus received. It was not the money of the holder, but of the drawer. (11 Paige, 612.)

Luff v. Pope, 5 Hill, 415, was an action upon an ordinary bill of exchange drawn by one Bell in favor of plaintiff Pope. The court said: * * * "There is no color for the argument that the instrument on which the plaintiff sued was not a bill of exchange. A bill of exchange is a written order or request by one person to another, for the payment, absolutely and at all events, of a specified sum of money to a third person. Now, what have we here? Bell requests Luff, thirty days after sight to pay a specified sum of money to Pope. It is payable absolutely, and without reference to any particular fund, and if it be not a bill of exchange, the wit of man cannot devise one. The justice thought it was not a bill, but only 'an order or instrument in writing,' because it was said at the time, and the proof tended to establish the fact, that Luff had funds in his hands belonging to Bell. It would be enough to say, that a written instrument which is perfectly plain and explicit on its face, cannot be changed into something else by anything which the parties said at the time of making it, nor by any extrinsic facts. It must speak for itself."

In *Hopkins v. Beebe*, 26 Pa. St. 85, it was held that the holder of a bill of exchange is not the owner of money, goods or effects remitted by the drawer to the drawee; nor has he any lien upon the funds, whether the remittance was made before or after the date of the bill; that effects remitted to meet a bill drawn, or intended to be drawn, are the property of the party remitting them, and he may transfer or use them as other men use their own, at any time after they are shipped; that the holder of a bill of exchange drawn against such remittance cannot call the remittee to

Opinion of the Court—Leonard, J.

account for them, or follow them into the hands of a party with whom he has no privity, and who has paid the remitter a valuable consideration for them; that if the bill be unpaid, the holder's remedy is an action on the bill itself.

The following additional authorities sustain those from which we have so liberally quoted: *Harrison v. Williamson*, 2 Edwards, Ch. 437; *Pope v. Luff*, 7 Hill, 577; *Dickinson v. Phillips*, 1 Barb. 454; *Kimball v. Donald*, 20 Mo. 577; *Drake on Attachments*, sec. 611.

An equitable assignment secures to the assignee the property against attachment for the debt of the assignor, although no notice be given prior to attachment. It is only necessary that notice be given in time to enable the person holding the property or owning the debt, to bring the fact of such assignment to the attention of the court before judgment is rendered against him as garnishee. (*Drake on Attachments*, sec. 527.) Between the parties, the assignment is complete the moment it is made, although no notice be given, and if, after the assignment, the assignor received payment of the debt, he will be obliged to pay the amount to the assignee. (*Drake on Attachments*, sec. 606; *Miller et al v. Hubbard*, 4 Cranch, C. C. R. 453.) If, then, the orders set out in the complaint operated as assignments, it follows that if any other creditor of P. & Co. had garnished the defendant immediately after the orders were delivered to plaintiffs, and before notice to such creditor or to defendant, plaintiffs' lien would have taken precedence, in case the defendant had received notice before its liability had become fixed as garnishee; and if these orders were assignments, it follows, too, that in all cases, a bill of exchange drawn upon the general fund or general credit of the drawer, is an absolute appropriation of his funds *pro tanto*; that thereafter the drawer has no further control of such funds; and, that after notice merely, if the drawer pays out such funds even to the drawee in person, he does so at his own peril and risk. If these orders are assignments, then every bill of exchange is an assignment, and the statute is practically a nullity. (*Compiled Laws*, 14.) There are many authorities which hold that, an order drawn on a particular

Opinion of the Court—Leonard, J.

fund in the hands of the drawee, the fund being stated in the order, is, *pro tanto*, an assignment of the fund to the payee. A less number, of the highest authority, hold, that before the order can so operate, it must call for the whole fund. But after careful research, we are not able to find a single decision of any court of last resort, which hold that a negotiable bill of exchange for less than the whole fund, operates as an assignment; and the fair result of the authorities is, that a bill of exchange proper, is never, *per se*, an assignment. As said by the author in *Pars. on Notes and Bills*, quoted above, there may be some *dicta* to the contrary, but no well-considered case. General expressions may be used in text books that indicate a different doctrine, until the cases cited by the author are examined. For instance, in *Story's Eq. Jur.*, sec. 1044, after speaking upon this subject, in actions at law, the writer says: "But in cases of this sort, the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of part of such debt. In each case a trust would be created in favor of the equitable assignee on the fund and would constitute an equitable lien upon it."

In referring to this language of Judge Story, the court in *Harris v. Clark*, *supra*, said: "This is undoubtedly true with respect to drafts on a special fund, which are not bills of exchange; and it will be found on a careful reading of the section referred to, and of the cases quoted in the notes, that the commentator is speaking of orders to pay over particular debts and drafts on particular funds and not of bills of exchange proper."

We are referred to *Hall v. The City of Buffalo*, 1 Keyes, 193; *Conway v. Cutting*, 51 N. H. 409; *Risley v. Smith*, 39 N. Y. (S. C. R.) 137, and *Lewis et al. v. Berry*, 64 Barb. 593, to sustain the doctrine that a court may receive and the jury consider testimony outside of the order itself to prove

that a bill of exchange was, in fact, drawn upon a particular fund instead of ascertaining the character of the instrument from the bill itself. Of the four cases cited, *Hall v. City of Buffalo* and *Conway v. Cutting* were actions upon orders drawn upon a particular fund specified in the orders. Such was not the fact in *Lewis v. Berry*, although there were facts connected with that case which do not appear in this. However, we prefer to adopt the principle announced in the many cases above cited, which hold that the order must speak for itself. Courts have no right, in effect, to interpolate words which were not inserted by the parties, and thus, practically change the character and value of the instrument. To so hold would be offering a premium to perjury, and the result would be uncertainty and disaster. The court erred in instructing the jury that the orders set out in the complaint operated as an assignment, and that, therefore, if defendant had notice of such orders it was liable to the extent of the amount therein specified, and which was due to P. & Co. *Risley v. Smith* is not in point. The question in that case was as to the consideration, which was held insufficient. The court also erred in giving the tenth instruction. Defendant's promise to pay the laborers was not an agreement to pay the debt of another. It was a promise to pay its own debt in a particular manner, and the laborers for whose benefit it was made could have maintained an action against defendant for their pay. (*Alcalde v. Morales*, 3 Nev. 137; *Barker v. Bucklin*, 2 Denio, 45; *Seaman v. Hasbrouck*, 35 Barb. 151; *Bishop & Carpenter v. Stewart*, recently decided by this court.) The court also erred in giving the thirteenth and fourteenth instructions. The order given by P. & Co. to defendant to pay the men was an assignment *pro tanto* in their favor. It was drawn upon a particular fund specified therein, and was an appropriation of such fund to the extent stated. It was also agreed to by the parties affected thereby. No written acceptance of such an order was necessary. After its verbal acceptance by defendant's superintendent P. & Co. had no further control over that amount of the fund. Nor was that order revoked by the ten-thousand-dollar order set out in the com-

Points decided.

plaint. The order to pay the men was irrevocable by P. & Co. without the consent of all the workmen for whose benefit it was made, and without the consent of defendant, until all the men had consented to its revocation, for until then defendant was liable for their pay. After the arrangement to pay the men had been agreed to by all the parties, so far as defendant was concerned, it was a power coupled with an interest, and not revocable in its nature. (*Tripp v. Brownell et al.*, 12 Cush. 379; *Osborne v. Jordan*, 3 Gray, 278; *Drake on Attachment*, secs. 517, 528, 594.)

The second and third instructions offered by defendant should have been given. We do not deem it necessary to pass upon any other assignments of error contained in the record.

The judgment and order appealed from are reversed and the cause remanded.

[No. 885.]

**MORE, REYNOLDS & CO., RESPONDENTS, v.
L. B. LOTT, APPELLANT.**

FINDINGS OF FACT—WHEN WILL BE PRESUMED.—Where a judgment is rendered for plaintiffs upon certain findings, in his favor, without any reference to the findings of fact upon certain issues raised in the defendants' answer: *Held*, that it will be presumed that such issues were found against the defendant.

STOPPAGE IN TRANSITU—RIGHT OF.—To enable the vendor of personal property to exercise the right of stoppage *in transitu*, the goods sold must be unpaid for, the vendee must be insolvent, and the goods must be in transit.

IDEM—MATERIAL TESTIMONY.—Any testimony which tends to show the ownership and right of possession of the goods in plaintiff, is admissible in evidence.

IDEM—INSOLVENCY OF VENDEE.—Any well-founded information of an embarrassment or failure on the part of the vendee to meet the demands of his creditors, is sufficient insolvency to justify the vendor in stopping the goods sold.

IDEM—IN TRANSIT.—Goods are in transit so long as they are on the passage, and until they come into the actual or constructive possession of the vendee, or of some person acting for him.

13 373
15 271
18 444
5* 67
20 116
17* 75d
20 117
17* 757
20 181
19* 35

13 376
21 234
21 376
29* 404
31* 1077

Argument for Respondents.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts are stated in the opinion.

T. W. W. Davies and *A. W. Crocker*, for Appellant.

I. The right of stoppage *in transitu* is an equitable privilege not provided for by our statutes. (Hilliard on Sales, 248, sec. 3.) It only accrues under extraordinary circumstances. (Parsons on Cont. [6 ed.] 395 *et seq.*; Hilliard on Sales [3 ed.], 279 *et seq.*) The complaint in this case fails to show the existence of such circumstances. The authorities are clear and uniform as to what state of circumstances must exist to give a vendor the right of stoppage *in transitu*. (Parsons on Cont. 595 *et seq.*; Hilliard on Sales, 291, sec. 297 *et seq.*) The right is lost after the goods pass into the constructive possession of the vendee. (Parsons on Cont. 601 *et seq.*; Hilliard on Sales, 286.) To commence an action of this nature before demand that the purchase-price be paid or information given to defendant of the grounds upon which plaintiff based his right, is clearly error. (Parsons on Cont. 596 and notes.) The right is only a lien upon the goods, and should they be sold at a price greater than the purchase-money, then the vendee is entitled to the remainder. (Parsons on Cont. 598; Hilliard on Sales, 284.)

Ellis & King and *M. A. Murphy*, for Respondents.

I. Flinn's refusal to pay the freight upon the delivery of the goods was a refusal to receive the goods. (*Wight v. Gardner*, 66 Ill. 94; *Lecacheux v. Cutter*, 6 Cal. 514.)

II. The right of stoppage *in transitu* in this case was perfect. Plaintiffs were the vendors of the goods; the goods were in transit, unpaid for; vendee insolvent, and refused to receive the goods; goods in the hands of a representative of the freighter, or carrier, and no delivery, either actual or constructive, ever made to vendee. (*Blackman v. Pierce*, 23 Cal. 509; *Jones v. Earl*, 37 Id. 630; *Rucker v. Donovan*, 13 Kan. 251; *Muller v. Pondir*, 55 N. Y. 325; *Callahan v. Babcock*, 21 Ohio St. 281; *Pattison v. Culton*, 33 Ind.

Opinion of the Court—Leonard, J.

240.) Defendant does not show payment of freight by him, nor connect himself with Fraser in his payment. (*Rucker v. Donovan*, 13 Kan. 251.)

By the Court, LEONARD, J.:

It is alleged in the complaint herein that on the seventeenth day of May, 1877, plaintiffs were the owners and entitled to the possession of certain personal property described; that on or about May 12, in Esmeralda county, defendant wrongfully and unlawfully took said property from the possession of plaintiffs, and still unlawfully withholds the same; that on the twenty-fifth day of May, and before the commencement of this action, plaintiffs demanded possession thereof, which was refused, and that said property was of the value of five hundred and forty-four dollars and fifty one cents.

Defendant denied plaintiffs' alleged ownership and right of possession, and averred that one Flinn was the owner and entitled to the possession. Defendant alleged that he was sheriff of said county, and as such officer attached said property on the seventeenth day of May, 1877, under and by virtue of a writ of attachment duly issued out of the justice's court in and for township No. 4, in said county, as the property of said Flinn, in an action entitled *Traver v. Flinn*; that he attached all the right, title and interest of Flinn in such property, and took possession thereof from the agent of one Ollinghouse, subject to a lien for freight, which lien he had discharged by paying the amount due. He denied plaintiffs' demand, and alleged that the value of the property did not exceed one hundred and fifty dollars.

Plaintiffs recovered judgment for a return of the property, or its value, three hundred and seventy-three dollars. This appeal is taken from an order denying defendant's motion for a new trial and from the judgment.

The cause was tried by the court without a jury, and the findings of fact were in substance as follows: 1. That on the thirteenth of April, 1877, More, Reynolds & Co. of San Francisco, plaintiffs herein, sold to one John Flinn of Candelaria, Esmeralda county, Nevada, a bill of goods

amounting to three hundred and seventy-three dollars; 2. That said goods were shipped from San Francisco by plaintiffs on the thirteenth day of April, 1876, consigned to John Flinn, Candelaria, Nevada; 3. That the goods arrived in Candelaria, on the sixth day of May, 1877; 4. That said Flinn refused to receive the goods; whereupon the teamster placed them in the hands and keeping of one Pierce of Candelaria for his freight money; 5. That immediately upon receiving the goods, Pierce notified plaintiffs of San Francisco that the goods were in his possession, and that he would hold them subject to their orders; 6. That on the tenth day of May, 1877, defendant, as sheriff of said county, attached them as the property of said Flinn when they were in the hands of Pierce, in the suit of *Traver v. Flinn*, before-mentioned; 7. That on or about May 13, defendant, as such sheriff, was notified by Pierce that the property in question then under attachment belonged to plaintiffs; 8. That Flinn has not paid plaintiffs for any part of said goods; 9. That Flinn never received any portion of the goods or paid the freight thereon; 10. That Flinn did not have an attachable interest in the goods because he had not paid for them, and had refused to receive them; 11. That plaintiffs had not lost the right of stoppage *in transitu*.

As conclusions of law from the foregoing facts, the court found that the plaintiffs were entitled to recover from defendant the property described in the complaint, and in case a delivery could not be had, then plaintiffs should have judgment for three hundred and seventy-three dollars, with legal interest from May 10, 1877, and costs of suit.

Plaintiffs recovered, and was entitled to recover, if at all, upon the ground that he had the right of stoppage *in transitu*, and that he exercised such right while the goods were in transit. "To enable the vendor to exercise this right the goods sold must be unpaid for, the vendee must be insolvent, and the goods must be in transit." (Story on the Law of Sales, p. 366.)

"The right of stoppage *in transitu* is paramount to any lien against the vendee. Thus it may be exercised to defeat any attachment or execution served upon the goods by

Opinion of the Court—Leonard, J.

a creditor of the vendee. An attachment operates only upon the interest of the debtor, but it does not defeat the paramount right of a stranger. If it did, the right of stoppage *in transitu* would be of little practical value, because an attachment of his property is often the first notice of the vendee's insolvency. The vendor's power of intercepting the goods is the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customer's goods for his general balance." (Hilliard on Sales, 289; Chitty on Carriers, 168; *Hays & Black v. Mouille & Co.*, 14 Pa. St. 48.) That the goods in question were sold and shipped by plaintiffs to Flinn, and that they were not paid for as found by the court, are facts undenied.

It was not found in terms by the court, that Flinn was insolvent, nor was the court asked to find upon this question. Insolvency is a prerequisite of the right of stoppage *in transitu*, and the court could not have found for plaintiffs without first finding as a fact from the testimony, that Flinn was insolvent at the time. Some authorities hold that the requisite insolvency must occur between the time of sale and the exercise of the right, but others hold, and we think correctly, that it is sufficient if it becomes known to the vendor after the sale. (*Buckley v. Furniss*, 15 Wend. 137; *Reynolds v. B. and M. R. R.*, 43 N. H. 580; *Benedict v. Schaettle*, 12 Ohio St. 515.)

In *Tubbs v. Ghirardelli*, 45 Cal. 231, it is decided that although actual findings appear in the record, which are insufficient of themselves to support the judgment, yet other findings will be implied in favor of the party who recovers judgment, embracing every fact in issue not expressly found in favor of the party against whom judgment was rendered, or irreconcilable with the express findings.

In the *City of Oakland v. Whipple*, 39 Cal. 115, the court say. "But in the absence of our express finding * * * we must presume the implied findings to have been such as were necessary to sustain the judgment." (*Warren v. Quill*, 9 Nev. 264; *Lovel v. Frost*, 44 Cal. 471; *Smith v. Cushing*, 41 Id. 98.)

Opinion of the Court—Leonard, J.

We must presume, then, that the court found the fact of Flinn's insolvency, although it is not expressly stated in the findings; also the fact that he became insolvent subsequent to the purchase of the goods, or that plaintiffs learned of his insolvency between the date of the purchase and of the stoppage. In other words, the case stands as though the court had specially found the facts just stated; and if there was no substantial conflict of evidence in relation to those issues, a motion for a new trial having been made upon a statement containing all the evidence, on the ground, in part, that there was no proof of insolvency, it is our duty to review the evidence applicable to those issues, as we would have done if the court had specially found them against defendant. (*Steinback v. Krone*, 36 Cal. 306.)

In the first place, defendant in his answer sets up the fact that on the seventh day of May, 1877, an action upon a contract made by Flinn was brought in the justice's court, and that the goods in question were attached in that suit by defendant. These allegations imply that Flinn failed to pay his debt according to contract, from inability or from some other cause. The testimony of Pierce shows that one Olinghouse, a teamster, brought the goods to Candelaria; that the latter went into Pierce's place of business and inquired for Flinn; that he went in the direction of Flinn's place, but soon returned, and said he wished to store the goods marked and shipped to John Flinn, as Flinn had refused to pay the freight; that Olinghouse wished Pierce to hold them for freight. Pierce took the goods to hold for the teamster until the freight-money should be paid. Olinghouse indorsed upon the shipping receipts: "Pay Pierce & Vernon the within charges." Traver, plaintiff in the attachment suit in justice's court, testified that he knew Flinn expected goods to arrive from San Francisco by Olinghouse's teams; that he learned they were stored with Pierce & Vernon for freight; that on the same day he called on Pierce and asked him if he had any goods marked and belonging to Flinn; that Pierce said he had, and that he was holding them for freight, but had no other claim on them. Traver then told Pierce that Flinn was owing him, and asked if he

Opinion of the Court—Leonard, J.

(Pierce) would give up the goods to Traver upon receiving the freight-money. Pierce did not wish to do so, and Traver told him that he should attach the goods.

The deposition of Samuel L. More, one of the plaintiffs, was admitted in evidence. It was taken under an agreement "that said deposition may be used on the trial of said action, subject to the same objections as if the said witness were there personally present and testifying therein." The eighth question was this: "Did you learn of the insolvency of said Flinn? If so, what did you do?" Witness answered: "We learned on or about the twelfth day of May, 1877, through Messrs. Pierce & Vernon, of Candelaria, of the failure of said Flinn, and they, Pierce & Vernon, at the same time notified us that they had received the goods shipped by us to Flinn, and had stored them for us, subject to our order."

The answer was objected to on the grounds that it was not responsive to the interrogatories; that it was immaterial; that it was hearsay; that there was no allegation in the complaint which could be proven by such testimony.

The first portion of the answer was directly responsive to the question. It was material. It was not hearsay. It tended to support the allegations of ownership and right of possession in plaintiffs; that is, their right to stop the goods while in transit, and was admissible under the pleadings. The complaint was sufficient (*Schofield v. Whitelegge*, vol. 12 Abb. Pr. R., N. S. 320; *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304; *Vanderburgh v. Van Valkenburg*, 8 Barb. 217), and any testimony tending to prove the principal issues, ownership and right of possession, was properly admitted. (*Gray v. Nations*, 1 Ark. 567.) The first part of the answer objected to tended at least to prove a special property in plaintiffs in the goods, and that, with the right of possession, is sufficient to maintain this action.

Defendant's objection was to the entire answer. If the last portion was not responsive, or was open to any of the objections stated, defendant should have objected to that part, or moved to strike out such portion. The objection to the entire answer was not well taken.

The last part of the answer would have been entirely proper in reply to the ninth interrogatory, and the objections under the eighth are purely technical. The other objections to the deposition were groundless, and it was properly admitted.

In answer to the ninth interrogatory the witness stated: "Immediately upon learning of the failure of Flinn, and that the goods had not been delivered to him, we instructed Pierce & Vernon to draw on us for the amount of the freight, and to dispose of the goods for us, and if unable to dispose of them as directed, then to hold them subject to our order."

We think the proof was sufficient to sustain the implied finding that Flinn was insolvent, and that he either became so subsequent to the sale of the goods, or that plaintiffs did not learn the fact until after the goods were attached.

"Any well-founded or probable information of such an embarrassment on the part of the other party as to prevent him from honoring his drafts, or meeting the demands of his creditors, is sufficient insolvency to justify the vendor in stopping the goods sold. But if, through excess of caution, or from misinformation, he make a mistake and stop the goods when the buyer is not insolvent, the buyer would be entitled to claim the goods and an indemnification for all the expenses growing out of the stoppage." (Story on the Laws of Sales, p. 369; *O'Brien v. Norris*, 16 Md. 122; *Secomb, Voorhies & Co. v. Nutt*, 14 B. Mon. 324; *Smith's Mercantile Law*, 678; *Lee v. Kilburn*, 3 Gray, 595; *Herrick v. Borst*, 4 Hill, 652; *Bayly v. Schofield*, 1 M. and S. 350; *Shone v. Lucas*, 3 Dowl. and Ryland, 223; *Chandler v. Fulton*, 10 Tex. 2.)

We are now brought to the inquiry whether the goods were or were not in transit, at the time plaintiffs claimed them adversely to Flinn.

It is settled by all the authorities that if goods have not been paid for, and the vendee becomes insolvent, the right of stoppage exists so long as they are on their passage, and until they come into the actual or constructive possession of the vendee, or of some person acting for him. The

Opinion of the Court—Leonard, J.

goods in question were directed, and were to be delivered to John Flinn at Candelaria. They arrived at the place named, but never reached the hands of the consignee. The teamster had the right to hold them until he received the freight money. He refused to deliver them until his bills were paid, and so long as they were in his hands, it cannot be said they were either actually or constructively in the possession of Flinn. Until the freight money was paid, Olinghouse had the entire possession and control of the goods, and after they were put into the hands of Pierce & Vernon, they succeeded to his rights as his agents, and not the agents of Flinn. Pierce & Vernon's store was a mere substitution for the teamster's wagon, and the goods were not any more in Flinn's possession, actual or constructive, after removal, than they were before. (Story on the Law of Sales, p. 382; *Mottram v. Heyer*, 5 Denio, 629.) If Flinn had paid the freight money due, before plaintiffs gave notice to Pierce & Vernon, and either taken the goods into his own possession or empowered them to hold the property as his agents, the transit would have been ended, and plaintiffs would have lost their right. But there was no privity of contract between defendants and Flinn, or Traver and Flinn, and payment by defendant or Traver, after attachment, gave Flinn neither possession nor right of possession, nor did it affect plaintiffs' prior and superior right to stop the goods at any time before they came into Flinn's possession. Defendant paid the freight bills as the agent of Traver, the only effect of which was to discharge the teamster's lien, and by such payment and the attachment, defendants became possessed of the goods, but Flinn did not. Worley, deputy sheriff, who attached the property, testified that it was never in Flinn's possession; that Flinn never exercised any control or acts of ownership over it. Besides, the freight bills were not paid until after plaintiffs had instructed Pierce & Vernon to hold the goods for them. So the transit was no nearer ended even on the twenty-third or twenty-fifth of May, when the defendant removed the property from Pierce & Vernon's store, and after plaintiffs had notified them of their claim, and directed them to

retain it for plaintiffs, than it was when the goods were in the teamster's wagon. In *Kitchen v. Spear*, 30 Vermont, 545, the facts were that A., residing in Vermont, purchased goods of B. in New York, to be forwarded by railroad to R., where A. resided. Immediately on the arrival at R., and before they were placed in the warehouse of the railroad company, A. having in the meantime become insolvent, C., a creditor of A., caused the goods to be attached, and to be taken directly from the cars and removed away from the railroad. The officer paid the freight upon the goods and retained possession of them under the attachment, until B. demanded them of him. It was held that B.'s right of stoppage *in transitu* had not ceased at the time of the attachment, or of the demand, and that he was entitled to the goods. (Hilliard on Sales, p. 301.) In Story on the Law of Sales, p. 389, the author says: "A delivery by a carrier is not complete until he actually and entirely parts with the possession; and this he is not bound to do until the freight due to him is tendered or paid; although if he waive such right by delivery, without payment, he thereby destroys the right of stoppage." Our opinion is, that at the time plaintiffs exercised the right of stoppage *in transitu* of the goods in question, the *transitus* was not at an end.

It is true that Flinn had the right, within a reasonable time after the stoppage, to pay the amount due plaintiffs and take the goods, but as between plaintiffs and defendant, the former were entitled to a judgment for a return of the entire property or its value. The court should have found the fact of Flinn's insolvency, but as we have seen, such finding is implied in support of the judgment. The tenth and eleventh findings of fact are properly conclusions of law—but no objection or exception having been taken to them in the court below, and no application having been made to correct or amend them, the point cannot be raised for the first time in this court. (*State v. Manhattan S. M. Co.*, 4 Nev. 318.)

The order and judgment appealed from are affirmed.

VOL. XIII.—25.

Points decided.

13 396
16 215

[No. 893.]

STATE OF NEVADA, RESPONDENT, *v.* ROBERT HAMILTON AND THOMAS LAURIE, APPELLANTS.

REASONABLE DOUBT—INSTRUCTIONS.—The court refused the following instruction asked by the defendant: "The jury is instructed that unless they are satisfied beyond a reasonable doubt that the defendants are guilty; that is to say, if you entertain a reasonable doubt upon any material point in the testimony essential to a conviction, you must give the defendants the benefit of the doubt, and acquit them:" *Held*, that the instruction was correct and ought to have been given. Upon rehearing: *Held*, that the same principles having in substance been given in other instructions asked by the defendants, the refusal of the instruction was not error. (*State v. O'Connor*, 11 Nev. 425, affirmed.)

INDICTMENT—DEPOSITIONS OF WITNESS TO BE INDORSED ON.—The names of witnesses whose depositions are read before the grand jury must be inserted at the foot of, or indorsed on, the indictment. (1 Comp. Laws, 1899.)

MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA—WAIVER.—By the provisions of sections 274-79 a motion to set aside the indictment must be made before demurrer or plea. If not so made, it will be deemed to have been waived.

TESTIMONY OF GRAND JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR ACTS.—The testimony of grand jurors is not admissible to impeach their acts in finding an indictment.

INSTRUCTION—CRIME COMMITTED IN ONE COUNTY WHEN ONE OF DEFENDANTS IS IN ANOTHER COUNTY.—The court refused to give the following instruction asked by defendant Laurie: "The jury is instructed that if they believe that an attempt was made to rob, as alleged in the indictment, and that at the time such attempt was made, the defendant, Laurie, was in Eureka county, Nevada, then they cannot convict him: *Held*, in the absence of any evidence showing the facts, not to be error.

IDEM—PRINCIPAL OR ACCESSORY BEFORE THE FACT.—Admitting the facts to be, as claimed by Laurie, that a plan was arranged between Laurie and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye county; that Laurie was to ascertain when the treasure left Eureka, and signal his confederates by building a fire on the top of a mountain in Eureka county, which could be seen by them in Nye county, thirty or forty miles distant; that the signals were given by him and his confederates attacked the stage and attempted to rob the treasure: *Held*, that Laurie would be not only an accessory before the fact, but a principal, at least in the second degree.

IDEM.—Where several confederates act in pursuance of a common plan, in the commission of an offense, all are held to be present where the offense is committed, and all are principals.

APPEAL from the District Court of the Fifth Judicial District, Nye County.

The facts are stated in the opinion.

Frank Owen and *W. C. Love*, for Appellants.

The points made by counsel are all stated in the opinion of the court.

John R. Kittrell, *Attorney-general*. for Respondents.

By the Court, BEATTY J.:

The defendants were convicted of an assault with intent to commit robbery, and have appealed from the judgment. A reversal is claimed upon several grounds, one of which appears to be well assigned.

The court refused the following instruction, which was requested by the defendants: "The jury is instructed that unless they are satisfied beyond a reasonable doubt that the defendants are guilty; that is to say, if you entertain a reasonable doubt upon any material point in the testimony essential to a conviction, you must give the defendants the benefit of the doubt and acquit them."

Some fault may possibly be found with the phraseology of this instruction, but it seems to us a sufficiently clear statement of the law universally applicable upon the trial of criminal charges. There is but one reason that could have justified its refusal, and that is that the court had already instructed the jury, of its own motion, to the same effect.

It is, however, a peculiarity of our criminal practice act, to which attention has been frequently called, that instructions requested of the court, and given or refused, are a part of the record, while a charge given of its own motion can only be made so by being included in a bill of exceptions. There is no bill of exceptions in this case showing what the charge of the court was, and nothing, consequently, to cure the error appearing in the record. It follows that the judgment must be reversed, a result that might perhaps have been avoided if the reason for refusing the instruction had been noted thereon. (9 Nev. 118; 11 Id. 426.)

There are some other questions presented upon this ap-

Opinion of the Court—Beatty, J.

peal which may arise again in the further progress of the case, and ought, therefore, to be determined before it is remanded.

It appears that on the seventeenth of November, A. D. 1877, the defendants moved to set aside the indictment, on the ground that the names of certain witnesses whose depositions were read before the grand jury, were not indorsed thereon.

Section 229 of the criminal practice act (C. L. 1,853) reads as follows: "When an indictment is found, the names of the witnesses examined before the grand jury shall be inserted at the foot of the indictment or indorsed thereon, before it is presented to the court."

It is contended that this provision does not embrace the witnesses whose depositions have been taken by the committing magistrate and returned to the district court. Perhaps, if read by itself, it would not be held to embrace such witnesses, but section 275 (C. L. 1,899) provides explicitly that the indictment shall be set aside on the defendant's motion when (among other grounds) "the names of the witnesses examined before the grand jury, or whose depositions may have been read before them are not inserted at the foot of the indictment, or indorsed thereon." This is conclusive of one branch of the question.

But it is also provided in effect (sections 274-9) that the motion to set aside the indictment must be made before demurrer or plea, or it will be deemed to have been waived. The bill of exceptions in this case does not show that the motion was made before plea, and the clerk has failed to copy into the record the minutes of the plea, so that it does not appear whether it was entered before or after the seventeenth of November, the date of the motion. But as the defendants would be entitled to have this omission of their plea corrected on a suggestion of diminution of the record, and as such correction would probably show that their motion was made in time, we shall assume that it was so made for the purpose of determining whether the court erred in overruling it.

The motion was supported by the affidavit of Granger,

one of the counsel for defendants, and by an offer to prove the facts alleged by the testimony of the grand jurors themselves. The affidavit of Granger is not included in the bill of exceptions, and we cannot decide whether it was competent or sufficient to sustain the motion. If it was presented before demurrer or plea, and did prove by competent and satisfactory testimony the facts alleged as the grounds of the motion, then the indictment should be set aside. But if the affidavit was not sufficient to sustain the motion it was properly overruled, for the testimony of the grand jurors was not competent to impeach their own indictment, and the court did not err in rejecting it. (See *State v. Logan*, and authorities cited, 1 Nev. 516; *State v. Baker*, 20 Mo. 339; *State v. Beebe*, 17 Minn. 241; *State v. Davis*, 41 Iowa, 311.)

It may be said that unless the testimony of the grand jurors is received in support of this motion the right to make it is nugatory. This may or may not be so, but it is certain that the principle that a juror shall not be allowed to impeach his own act is now generally if not universally upheld, and it is equally certain that the oath of a grand juror cannot be received in favor of the facts here alleged without allowing him to impeach his own act, or to show that he voted against finding the bill, which is a thing positively forbidden. (C. L. 1838.) The statute provides for just one case (C. L. 1839) in which a grand juror may disclose what has transpired in the jury-room, and by implication excludes all other cases.

We cannot say that the district court erred in denying the challenge to the panel of the petit jury, because it does not appear from the bill of exceptions that the challenge was in writing, nor that it was taken before a juror was sworn. (C. L. 1948; *State v. Millian*, 3 Nev. 409.) Besides, it does not appear what, if any, evidence was offered in support of the challenge; and in the absence of any satisfactory evidence to sustain it the court could not do otherwise than deny it. (*State v. Rigg*, 10 Nev. 289.)

Neither can we say that there was any error in overruling the motion of defendant, Laurie, that he be discharged on

Opinion of the Court—Beatty, J.

the ground that the evidence showed that he was in Eureka county when the crime alleged in the indictment was committed. The evidence is not in the record, and there is nothing to show that Laurie was in Eureka county when the crime was committed.

— The motion to discharge Laurie having been overruled, he requested the court to give the following instruction, which was refused: "The jury is instructed that if they believe that an attempt was made to rob, as alleged in the indictment, and that at the time such attempt was made the defendant, Laurie, was in Eureka county, Nevada, then they cannot convict him."

The attempt to rob is alleged to have been committed in Nye county, where the indictment was found; and this exception presents the question whether, under any circumstances, a defendant could be legally convicted in Nye county upon an indictment found in Nye county, for an offense committed in Nye county at a time when the defendant was in Eureka county. It is contended that if Laurie was in Eureka county when the assault was committed in Nye county, he could only have been connected with it as an accessory before the fact, and that, as such, he could not be indicted in Nye county jointly with the active participants. Counsel, in support of this proposition, rely on section 91 of the criminal practice act (C. L. 1719), which is as follows:

"In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county."

Without determining whether this section is to any extent qualified or controlled by other statutory provisions—conceding that according to its plain terms an accessory before the fact can only be indicted and tried in the county where the offense was committed—and assuming that the testimony in this case tended only to show that Laurie was an accessory before the fact, it still does not follow that the instruction was not correctly refused. If Laurie counseled

and advised the attempted robbery while he was in Nye county, his absence from the county when the attempt was made does not prevent him from being indicted and tried jointly with those directly concerned. If the refusal of this instruction could be justified on no other ground, we would presume in favor of the correctness of the ruling of the district court, that the evidence tended to prove the case supposed.

But it is not true that Laurie, if in Eureka county when the attempt to rob was made in Nye county, could only have been connected with the crime as an accessory before the fact.

Our statute concerning crimes and punishments defines an accessory as follows (C. L., 2316):

“Sec. 10. An accessory is he or she who stands by and aids, abets or assists, or who not being present aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed or considered as principal, and punished accordingly.”

This definition includes not only an accessory before the fact (one who has advised and encouraged), but also an accessory at the fact or principal in the second degree (one who stands by and aids, abets or assists). (See 1 Bishop's Cr. Law, sec. 648 *et seq.*)

By the latter clause of the section it is enacted that both shall be deemed and considered principals, and this taken in connection with section 252 of the Criminal Practice Act (C. L., 1876), might be held to have abolished all distinctions for every purpose between principals of the first and second degree and accessories before the fact, were it not that section 91, above quoted, seems to make an exception in favor of accessories before the fact so far as the local jurisdiction of the offense is concerned.

Section 252 declares that “no distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, in cases of felony, and all persons concerned in the commission of a felony, whether they directly commit the act constituting

Opinion of the Court—Beatty, J.

the offense or aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals."

There is an apparent incongruity between this section and section 91, which was commented upon in the *State v. Chapman* (6 Nev. 329, 330.) But in our opinion the utmost effect that can be given to section 91 is to say that an accessory before or after the fact must be tried in the county where his offense was committed. An accessory *at the fact* or principal in the second degree should always be indicted and tried where the offense was committed.

Now it is a matter within the judicial knowledge of the court that Eureka county is divided from Nye county merely by an imaginary line, and it is quite possible that Laurie might have stood in Eureka county in sight and hearing of what was done by Hamilton in Nye county. He may have been near enough to render direct and immediate assistance. This is another case in which the instruction in question would have been improper.

But as the only purpose of this discussion is to settle the question which will necessarily arise when the case comes to be re-tried, it will be as well to assume that the evidence against Laurie was of the character suggested in the argument.

X We will suppose that it tended to prove that a plan was concerted between Hamilton, Laurie and others, to rob the treasure-box of Wells, Fargo & Co., on the road from Eureka to some point in Nye county; that the part of Laurie was to ascertain when the stage left Eureka, and to make a signal to his confederates by building a fire on top of a mountain in Eureka county, which could be seen by them from a point in Nye county, thirty or forty miles distant; that he did inform himself of the departure of the messengers with the treasure; that he gave the concerted signal; that Hamilton and Davis thereupon attacked the stage; that Davis was killed and one of the messengers wounded, and that the robbery failed only because of too stout a resistance on the part of those in charge of the treasure.

If such was the character of the evidence against Laurie,

we are satisfied that the instruction ought to have been refused. In the case supposed, Laurie would be not only an accessory before the fact (as having counseled, advised and encouraged the commission of the crime), but he would be a principal at least in the second degree.

Where several persons confederate together for the purpose of committing a crime which is to be accomplished in pursuance of a common plan, all who do any act which contributes to the accomplishment of their design are principals, whether actually present at its consummation or not. They are deemed to be constructively present though in fact they may be absent. (1 Bishop Cr. Law, sec. 650.)

In a note to this section Mr. Bishop says: "In an English jury case, Creswell, J., on consultation with Patterson, J., ruled that if one of two confederates unlocks the door of a room in which a larceny is to be committed, then goes away and the other confederate comes and steals the goods, the former is not a principal in the theft. (*Reg. v. Jeffries*, 3 Cox C. C. 85.) I doubt the soundness of this ruling. If sustainable, it must be on the ground that the unlocking of the door constituted no part of the crime. But it seems to me that it was a part of the criminal transaction, distinctly contributing to the end. In Ohio, one of several confederates enticed the owner of a store a mile away and detained him while the others broke open the store and took the goods; and the court held, it seems to me correctly, that he was a principal. The decision was put upon the ground that he was constructively present. He not merely advised, but bore a part in the criminal transaction. That constitutes a principal, whether we call it being constructively present or not." (*Breese v. State*, 12 Ohio State, 146; see also *Hess v. The State*, 5 Ohio, 12; *Reg. v. Vanderstein et al.*, 10 Cox's Cr. Cases, 177; *Commonwealth v. Lucas*, 2 Allen, 170; *Tate and another v. The State*, 6 Blackf. 110; *Rex v. Lockett*, 7 Carrington and Paine, 300; *Rex v. Passey Meadows et al.*, Id. 281; *Rex v. Kirkwood et al.*, 1 Moody's Crown Cases, 304; *Rex v. Bingley et al.*, 1 Russ. and Ryan Crown Cases, 446.)

These cases all support the proposition above stated, that

Opinion in response to petition for rehearing.

where several confederates act in pursuance of a common plan, in the commission of an offense, all are held to be present where the offense is committed, and are all principals.

Our conclusion is that upon the case suggested the instruction was correctly refused.

The judgment is reversed for the error in refusing the first instruction above quoted, and the cause is remanded for further proceedings.

RESPONSE TO PETITION FOR REHEARING.

A rehearing was granted in this case upon suggestion by the attorney-general that a corrected transcript of the record would show that the district court gave to the jury, at the request of the defendants, instructions precisely equivalent to that for the refusal of which we decided that the judgment must be reversed. It now appears that the following instructions, asked by the defendants, were allowed:

"The jury is instructed that this case is one wherein the evidence is entirely circumstantial, and that unless it is inconsistent with any other rational conclusion than that the defendants are guilty, then the jury must find the defendants not guilty."

"The term 'reasonable doubt' is one often used. The jury are instructed that they must be satisfied from the evidence of the guilt of the defendants, or either of them, beyond a reasonable doubt, before the jury can legally find him guilty of the crime charged against him. The jury shall be satisfied from the evidence, to a moral certainty, and beyond a reasonable doubt, that the defendants, or one of them, and no other or different person or persons, committed the alleged offense."

We think these instructions were as clear and full and favorable to the defendants as the instruction refused; and in substance amounted to the same thing. Therefore the refusal of that instruction was not error (*State v. O'Connor*, 11 Nev. 425); and the judgment appealed from should be affirmed.

It is so ordered.

Argument for Appellants.

[No. 886.]

C. H. HANSON, ADMINISTRATOR OF THE ESTATE OF A. L. PAGE, DECEASED, RESPONDENT, v. JOHN CHIATOVICH ET AL., APPELLANTS.

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FINDINGS—DOCUMENTARY EVIDENCE MUST BE EMBODIED IN A STATEMENT.—

Neither the findings of the court below, nor the documentary evidence admitted at the trial will be considered in the appellate court unless embodied in the statement or identified as required by statute.

PRESUMPTION AS TO OWNERSHIP OF PROPERTY.—Where personal property is shown to be the property of a party prior to his death: *Held*, that the law would presume, in the absence of any evidence to the contrary, that it continued to be his up to the time of his death.

TITLE TO PROPERTY—DECLARATIONS OF OWNER.—The declaration of a party while in the possession of personal property that it belonged to him, and it being marked in his name, furnished some evidence in proof of his title.

DEMAND—WHEN NOT NECESSARY.—When property is taken by a party without the owner's knowledge or consent, or levied upon and sold under an execution against another party, no demand is necessary to enable plaintiff to maintain an action for its recovery.

POSSESSION OF PROPERTY—PRIMA FACIE EVIDENCE OF OWNERSHIP.—The mere possession of personal property is only *prima facie* evidence of ownership, and will not protect the purchaser buying on the faith of such possession against the claims of the true owner.

ESTOPPEL—MUST BE PLEAD.—Where a defendant relies upon the defense of estoppel, he must, in his answer, allege the facts constituting the estoppel.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The facts sufficiently appear in the opinion.

T. W. W. Davies and A. W. Crocker, for Appellants.

I. The court erred in not dismissing the action on the ground that no demand had been made before suit. (*Dau-miel v. Gorham*, 6 Cal. 43; *Taylor v. Seymour*, 6 Id. 512; *Killey v. Scannell*, 12 Id. 73; *Ludley v. Hayes*, 1 Id. 160; *Paige v. O'Neal*, 12 Id. 483; *Moore v. Murdock*, 26 Id. 524.)

II. A person having possession of personal property should be held to be the owner, else an innocent person must suffer. (*Chitty on Cont.* 685, notes; *Poorman v. Mills*, 39 Cal. 353.)

Opinion of the Court—Hawley, C. J.

III. The transfer of real estate constitutes a legal transfer of the personal property on said estate. (*Montgomery v. Hunt*, 5 Cal. 366; *Hodgkins v. Hook*, 23 Id. 581.)

IV. The goods will be presumed to be owned by the owner of the premises, even if the vendee's servant be on the premises, and also in possession of the goods. (Chitty on Cont. 7 Ed. 414.)

V. When one allows another to deal with his property as if it belonged to the latter, he is concluded thereby. (1 Green. Ev. sec. 207; *Hostler v. Hays*, 3 Cal. 307; Bouvier's Dic. Max. 129; C. C. Cal. sec. 1142; Hill. on Sales, 45.)

Ellis & King, and M. A. Murphy, for Respondents.

The estoppel relied upon against Hanson is not pleaded, and for that reason the defendants were not entitled to rely upon it. (*Lansing v. Montgomery*, 2 Johns. 382; *Crandall v. Gallup*, 12 Conn. 365; *Howard v. Mitchell*, 14 Mass. 241; *Isaacs v. Clarke*, 12 Vt. 692; *McNair v. O'Fallen*, 8 Mo. 188; *Lord v. Bigelow*, 8 Vt. 461; *Sharon v. Minnock*, 6 Nev. 377.)

By the Court, HAWLEY, C. J.:

This action was brought by the plaintiff, Hanson, to recover a certain lot of machinery for a quartz mill, consisting of an engine, boiler, etc., alleged to be the property of A. L. Page, deceased.

The cause was tried before the court without a jury. Judgment was rendered in favor of the plaintiff. The defendants moved for a new trial, which was refused. This appeal is from the judgment and from the order refusing a new trial.

1. The question whether the evidence sustains the findings cannot be considered because the findings of the court are not embodied in the statement on motion for a new trial. (*Alderson v. Gilmore*, ante, 84, and cases there cited.)

2. The documentary evidence contained in the transcript cannot be considered because not embodied in the statement or identified as required by the statute. (1 Compiled Laws, 1258; *Dean v. Pritchard*, 9 Nev. 232.)

3. There was, in our opinion, sufficient evidence on the part of plaintiff (although it was very slight) to sustain the action of the court in refusing to grant a nonsuit. It was not absolutely essential that the testimony upon the part of plaintiff should establish the title of Page by direct testimony that it was his property on the day of his death. If shown to be his property prior to that time the law would presume, in the absence of any evidence to the contrary, that it continued to be his up to the time of his death, and that it belonged to the estate at the date of the commencement of this action. The declaration of Page, while in the possession of the property, that it belonged to him, taken in connection with the fact that it was marked in his name, furnished *some* evidence, at least, in proof of his title.

4. The principle of law that when one of two innocent parties must suffer loss by the fraudulent act of a third, he who enables such third party to occasion the loss must bear it, as decided in *Poorman v. Mills*, 39 Cal. 345, and other cases, has no application to the facts of this case. There is no testimony in the record that either Page, in his lifetime, or his administrator, after his decease, consented to the taking of the property in question by the Alida S. M. Co.

5. If the property belonged to Page the taking possession of it, without his knowledge or consent, by the Alida S. M. Co., or the levying upon it and selling it under an execution against the Alida S. M. Co., by the grantor of the defendants, was unlawful and no demand was necessary to enable the plaintiff to maintain this action.

6. The testimony does not conclusively establish the fact, as claimed by appellants, that Page during his life-time sold the property to the Alida S. M. Co. It only shows that Murray, the superintendent of said company, "claimed that the deed from Page to the Alida S. M. Co. was intended to convey all of the property that he had in Alida, and that it did convey all such property;" that Higgs "always claimed that the machinery for the new mill was included in the mortgage" to him and Travis; that he at one time had the possession of the property and offered to sell it, and that Murray instituted certain proceedings, by *man-*

Points decided.

damus, against Higgs, and thereby obtained possession of the property in controversy.

The statement sets forth the fact that the "peremptory mandamus," the deed from "Page to the Alida S. M. Co.," and the mortgage from "Page to Higgs and Travis," was offered as rebutting evidence on the part of the plaintiff (although not in the statement or identified in the transcript so as to authorize us either to examine or consider the same), leaving the inference at least that these documents did not sustain the assertions and claims of the respective witnesses.

The mere possession of the personal property by the Alida S. M. Co. was only *prima facie* evidence of title, and did not protect the purchaser, buying on the faith of such possession, against the true owner of the property.

7. As none of the documentary evidence can be considered, the offered testimony of the witness Nicholas becomes immaterial, and it is therefore unnecessary to decide whether the court erred in refusing to admit it.

8. There is no testimony in the record that the defendants or their grantor were ever misled as to the ownership of the property, by any act of Page or of the plaintiff, so as to create an estoppel. If the defendants relied upon such a defense they ought to have alleged the facts constituting the estoppel in their answer.

The judgment of the district court is affirmed.

[No. 882.]

FRANK RIVERS, RESPONDENT, v. S. M. AND C. E. BURBANK, APPELLANTS.

INJUNCTION—WHEN SHOULD NOT BE ISSUED.—An injunction should not be issued to enjoin a defendant from doing, upon the public domain, what the paramount law declares he may do (dig a ditch) when he is not insolvent or unable to pay all damages that may be done. (*Thorne v. Sweeney*, 12 Nev. 254, affirmed.)

POSSESSION OF LANDS, SURVEYS WHEN RECORDED.—BURDEN OF PROOF.—In construing the act to regulate surveyors and surveying, (Stat. 1861. 267; Stat. 1864-5, 344): *Held*, that the surveys of land to be evidence

Argument for Appellant.

of possession must be filed for record within the time provided by statute, and that the burden of proof was upon the plaintiff to show that they were so recorded.

IDEM—CUSTOM AS TO POSSESSORY TITLE NOT ADMISSIBLE.—Instructions informing the jury that they might consider any well known or recognized customs among the farmers as to the manner of claiming and holding land by possessory title: *Held*, inadmissible.

ACTUAL POSSESSION—DEED TO ENTIRE TRACT.—The rule, that actual possession of land may be had without fences or inclosures; by proving that a party lives upon and cultivates a portion of it and holds a deed to the whole tract, does not apply to a case where a party enters upon the land knowing it to be a part of the public domain, and that his deed was inoperative to convey any title. (*Eureka M. & S. Co. v. Way*, 11 Nev. 171, affirmed).

IDEM—WANT OF DILIGENCE.—Where the plaintiff testified that he inclosed the land as rapidly as he was able; but failed to show any act or effort of his in this behalf for a period of two years: *Held*, upon a review of all the facts, that plaintiff failed to show that he proceeded with reasonable diligence to subject the land to his dominion or control.

IDEM—MARKING OF BOUNDARIES.—The land claimed was agricultural or grazing land; it had been used as a common for grazing purposes without objection; there was no inclosure of any portion of the land upon which the ditch of defendants was dug; on one side of the land posts, two rods apart had been set; on another side post-holes were dug the entire distance, posts were set a part of the way and scattered upon the ground on the remaining part, for long distances the post-holes were filled up and there were few if any signs of a marked boundary. At one place there was a distance of forty rods with no boundary line except a ditch belonging to defendants, while the next forty rods had no boundary but a public road. In the whole eighty rods there was not a post-hole, post, or fence of any character: *Held*, that this testimony was wholly insufficient to create any possessory right to the land.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts appear in the opinion.

Ellis & King, and *D. J. Lewis*, for Appellant.

I. The perpetual injunction must be dissolved. (*Thorne v. Sweeney*, 12 Nev. 251 and cases cited; 5 Cal. 119; 7 Johns. Ch. 334; 42 Eng. Ch. 165; 47 N. H. 437.)

II. This land is a part of the public domain, and Burbank had the right, under the act of congress of July 26, 1866 (sec. 2339 Rev. Stat. U. S.), to construct the ditch for agricultural purposes. At the time of the alleged tres-

Opinion of the Court—Leonard, J.

pass, plaintiff was not in the actual, open and notorious possession of the land. (4 Nev. 66 and cases cited; *Sankey v. Noyes*, 1 Nev. 69; *Lechler v. Chapin*, 12 Nev. 65.)

III. The title was in dispute and the injunction should not have been granted. (High on Injunctions, secs. 257, 261-63.) The damage is alleged to have all been in the past, and none threatened in the future; for this reason the injunction ought not to have been granted. (High on Injunctions, secs. 4, 8 and 10; 4 Nev. 141; *Thorne v. Sweeney*, *supra*.)

Robert M. Clarke, for Respondent.

The several points discussed by counsel are stated in the opinion.

By the Court, LEONARD, J.:

This is an appeal from an order refusing to dissolve a temporary injunction—an order denying defendants' motion for a new trial, and from the judgment. The action was brought to recover eight hundred dollars damages for an alleged trespass in digging a ditch over and upon the land described in the complaint, and running water therein. Plaintiff also prayed the court to enjoin the defendants from digging said ditch, from conducting water therein, and from committing any further damages upon the land described. The defendants were enjoined until further order of the court. After due notice, defendants moved to dissolve the injunction upon the complaint and answer. That motion was denied, and plaintiff obtained a verdict in his favor for one hundred and fifty dollars damages, for which sum judgment was entered against defendants, besides seven hundred and twenty-six dollars and thirty-five cents costs, and defendants were enjoined "from the construction of any ditches, and from the running of any waters, over, through, or upon plaintiff's said land, and forever restrained and enjoined from further damaging said premises by the digging of ditches or the running of water as aforesaid."

In his complaint, plaintiff alleges these facts only: "That

since March, 1871, he has been, and still is, the owner, in possession and entitled to the possession of six hundred and forty acres of land described therein; that he has a family residence upon said land, in which he and his family reside; that he has cultivated a garden and grows grass and grain upon said land; that on the tenth day of April, 1877, without plaintiff's consent and against his will, defendant forcibly and unlawfully entered upon said land and cut a ditch one mile in length across the same for the purpose of conveying water; that by the cutting of said ditch and throwing the earth from it over a portion of said land, the latter has been rendered unfit for cultivation, plaintiff's property has been injuriously affected, and his use of it obstructed, by defendant's ditch, to plaintiff's damage in the sum of \$800; that the damage being done to plaintiff's land by the digging of said ditch and the flowing of said water in and upon the land described, is irreparable; that plaintiff has been informed and believes, and so charges the facts to be, that defendants are insolvent and cannot respond to him in damages for any judgment he might obtain against them; that plaintiff is without any adequate remedy at law and is entirely remediless, without the equitable interposition of the court." No other facts are stated. Defendants deny all the material allegations of the complaint, and consequently all the equities, by a sworn answer. S. E. Burbank, one of the defendants, avers that on the second day of April, 1877, he became the owner in fee, conditional, of a large portion of the land described, and over which said ditch was constructed, by purchase from the government of the United States, under an "Act to provide for the sale of desert lands in certain states and territories," approved March 3, 1877, and that he is still the owner, in the possession, and entitled to the possession, of the lands so purchased.

Counsel for plaintiff admit that the averments of the complaint in support of the injunction are exceedingly defective; but they urge that, in the absence of a demurrer, they are sufficient after verdict and judgment for plaintiff, if the evidence sustains the judgment. Without deciding whether

counsel are or are not correct in their conclusions, as to the effect of the defective pleading, we shall assume, for the sake of the argument only, that they are correct, and shall examine the case in the light of the evidence, there being no substantial conflict as to the controlling facts. We pass the alleged error of the court in refusing to dissolve the temporary injunction, and shall consider the questions presented, from two standpoints.

1. Admitting, for the present, that plaintiff was entitled to a judgment for one hundred and fifty dollars damage, was he also entitled to an injunction?

2. Was he, from the evidence, entitled to any damages?

There are many reasons why the first question must be answered against the plaintiff, some of which will be stated. It by no means follows that the court would have been justified in enjoining defendants after verdict for plaintiff, even though the proof, had established the fact that plaintiff's legal rights in the land were superior to the rights of defendants. (*Wason v. Sanborn*, 45 N. H. 171; *Thorne v. Sweeney*, 12 Nev. 254.) The land in question at the time the final injunction was granted, was a portion of the unsurveyed public domain. Plaintiff has never taken any step to acquire title from the government. Under such circumstances there can be no doubt, that under the act of congress of July 26, 1866 (sec. 2339, U. S. Rev. Stats.), defendants had the right of way for the construction of their ditch over this land, subject only to the liability of paying for all damages or injuries done by them to plaintiff's possession. By that section the right of way for the construction of ditches and canals upon the public domain, for agricultural and other purposes named therein, is acknowledged and confirmed. There was no testimony showing or tending to show that in the construction of their ditch, or in conducting water therein, defendants interfered with, or injured, plaintiff's possession, unless he was in possession of the land itself. They did not injure any crops, fences or other improvements. The allegation of defendants' insolvency was fully denied by the answer, and there was no testimony tending to show that they were unable to respond in dam-

ages for any amount that might be recovered against them, in this or any subsequent action. Such being the case, we must presume that defendants were entirely solvent.

Upon this point, then, our case is this: Defendants are enjoined from doing, upon the public domain, what the paramount law declares they may do, when they are able to pay all damages done, or that may be done, to plaintiff's possession. It is a part of the act of congress organizing the territory of Nevada, that "no law shall be passed interfering with the primary disposal of the soil." The injunction in this case did, indirectly, so interfere. It deprived defendants of a right acknowledged and confirmed to them. The court could not do indirectly what the legislature was expressly prohibited from doing. Besides, the injury is not irreparable. Full compensation can be recovered in an action at law, if plaintiff has the superior title. Upon the question of damages plaintiff testified as follows: "In digging the ditch, defendants threw the earth out of it on the bank—the north bank. They also flowed water through it. With the ditch and the water, they have damaged me in a considerable sum of money. It is difficult to estimate the amount of damage. I think that, including what it would cost me to fill up the ditch, the damage is equal to the amount named in the complaint. Don't think I could fill it up for less than a thousand dollars. I consider it a continuing damage as long as the ditch is there. * * * The water in the Burbank ditch is a damage to my ranch, in addition to cutting it up and making it more difficult to farm. It will cause willows to grow along the bank of the ditch after a time. That has been the effect produced by the West Walker river ditch."

T. B. Smith, a witness for plaintiff, testified that "he thought the ditch was a damage to plaintiff's land; that if he owned the land he would not have the ditch run over it for considerable money." Defendants testified that they were in great need of the water; that they had no other source from which they could obtain water for irrigating their land; that if they were deprived of its use, their crops would be entirely and hopelessly destroyed, and that they would be damaged thereby several thousand dollars in one season.

Opinion of the Court—Leonard, J.

The above is all the testimony upon the question of damage. The ditch was completed, and the water turned in and kept running, some time before the preliminary injunction even. At the time of the final injunction, the only act done, or to be done by defendants, was the running of water in a completed ditch, through an open, unoccupied, uncultivated portion of the public domain, used only for grazing purposes by plaintiff, and others who had no claim to it. If the digging of the ditch damaged plaintiff, such damage was complete before defendants were enjoined. The only possible future damage that could have been anticipated, was such as might result from keeping the ditch in repair, and running water therein, through an arid country that must be irrigated by artificial means before any kind of crop can be produced. There is no testimony that any injurious result will follow from the running of water in the ditch, except that it will cause willows to grow upon the banks. Whether such growth will be an injury, and if so, how much, or a benefit, does not appear. At any rate, admitting for the present purpose, that plaintiff's rights are superior to defendants'; it is apparent that his injury, on account of the running water, is but trifling in comparison with defendants' losses, if they are deprived of its use. The preliminary injunction should have been refused, because the complaint was insufficient to justify it; but having been granted, it should have been dissolved on defendants' motion, and a final injunction should have been denied after verdict for plaintiff. (*Thorne v. Sweeney*, 12 Nev. 254.)

We now come to the inquiry, whether upon the undisputed facts of the case, plaintiff was or was not entitled to recover damages in any sum. The answer first depends upon the result of another inquiry, to wit: At the time of the alleged trespass did plaintiff have such title or possession as entitled him to maintain this action for injury to the land itself? If he did not, the condition of defendants' title is a matter of no consequence.

As in ejectment, a rightful possession in the plaintiff is sufficient to enable him to maintain this action. (*Rogers v. Cooney*, 7 Nev. 217.)

In *Staininger v. Andrews*, 4 Nev. 66, this court said: "There seem to be but two methods in this state of acquiring title sufficient to maintain ejectment to public lands not surveyed or brought into market by the general government, and these are: First. By a compliance with requirements of 'An act prescribing the mode of maintaining and defending possessory actions for public lands in this state,' (Laws of 1864-65, 343); and, Second. By actual possession or occupation of such land." In pursuing our inquiry as to the plaintiffs rights we need not consider the effect of a compliance with the desert land law, because he claims no rights under that.

At the trial plaintiff offered, and the court admitted, in evidence, two certificates of survey, known as the Hall & Simpson survey, made April 29, 1864, and the Mitchell & Fuller survey, made on the preceding day, which covered the land occupied by defendants' ditch. They were made under the tenth and thirteenth sections of the statute of 1861, 267, entitled "An act to regulate surveyors and surveying," which sections were repealed March 9, 1865. (Stat. 1864-65, 344.)

The certificate to the Hall & Simpson survey was made June 10, 1864, but it was not recorded or filed for record until November 22, 1865. The certificate to the Mitchell & Fuller survey was made June 19, 1864, but was not recorded, so far as the record shows, until April 9, 1877; that is to say, the only proof before us that it was ever recorded, is a certificate of the county recorder, dated on the day last named, to the effect that a certain paper marked "Exhibit B" is a true and correct copy of the description and plat of the survey of land made for Mitchell & Fuller as appears of record * * * in his office.

Sections 10 and 13 of the statute of 1861, before referred to, read as follows:

"Sec. 10. Each county surveyor shall, within thirty days after completing any survey, make out a copy of the field notes and plat, and transmit one to the surveyor-general, and give a certificate of such survey to the person for whom it was made; * * * and such certificate, provided the

Opinion of the Court—Leonard, J.

same shall be recorded in the county record within thirty days after the delivery of such certificate, shall be evidence of the title of possession to the person or persons holding the same.

“Sec. 13. Such survey so made, except in cases of mining claims, shall be evidence of possession for one year from the date of record of such survey.”

The court instructed the jury as follows: “The presumption of the law is, that the plat of survey of Mitchell & Fuller’s tract was filed within the time required by law, there being no evidence to the contrary.”

It will be noticed that sections 10 and 13 were repealed before the Hall & Simpson survey was recorded, and there is no evidence showing that the Mitchell & Fuller survey was recorded before their repeal; also that the former was not recorded until long after the sixty days next succeeding the date of survey; and presuming the surveyor did his duty, that it was not recorded until long after the thirty days next succeeding the date of its delivery to Hall & Simpson. And to say the least, there is no proof that the Mitchell & Fuller survey was recorded within the time prescribed by the statute. Section 10 made the doing of certain acts, therein stated, evidence of possession, but the recording of the surveyor’s certificate within thirty days from the date of its delivery, was made a condition precedent to its becoming such evidence. The burden of proof was upon plaintiff to show that they were recorded in time. The law may presume that the surveyor did his official duty and delivered his field notes, plat and certificate in time; but it does not presume in the absence of proof showing such facts, that either Hall & Simpson, or Mitchell & Fuller filed them for record, or that they were recorded, within thirty days after delivery to them.

The court also admitted in evidence a deed from Hall & Simpson to Frank Hall, and another from the latter to plaintiff, conveying the land described in the Hall & Simpson survey. These deeds were offered “for the purpose of showing title in the plaintiff from Hall & Simpson, through and under the survey offered, and to connect plaintiff with

Opinion of the Court—Leonard, J.

said survey for the purpose of showing title under the same." Both deeds were acknowledged before the Hall & Simpson survey was recorded and long after the sixty days next succeeding the survey had expired. At the time the deeds were acknowledged, as well as at the time of the trial, the survey and the certificate thereto were not evidence of possession under the statute, and consequently the deeds were not admissible for the purposes stated. The deed from Mitchell to plaintiff, offered for the same purpose, was, for the same reason, inadmissible for such purposes. Plaintiff testified that until 1874 or 1875, there was but little of the land in Smith's valley actually inclosed; that the farmers of the valley herded the stock off of their land during the growing and harvesting seasons; that they had an understanding to that effect, and that it was a custom among them; that they also recognized and respected the boundaries of each other's farm, regardless of the fact that they were not inclosed, and regardless of the fact that such boundaries were not particularly marked. The testimony just stated was admitted against defendants' objection, and the jury were instructed "that in determining the fact of possession they were entitled to consider the character and location of the land, the acts of the claimant, and the improvements made upon the land, and any well-known and recognized custom at the time prevailing in Smith's valley, and known to and acted on by the parties, as to the manner of claiming and holding land by possessory title merely, and as to the construction of fences and marking of boundaries of land."

They were further instructed that "if they believed from the evidence that prior to 1875 it was a universal custom, well known and recognized among the residents of Smith's Valley, to claim and hold land by possessory right without inclosure or fencing the same, and that defendants and plaintiff knew of such custom and recognized it, and claimed and held their lands under such custom; and that plaintiff occupied and claimed the land in question under such custom; and that afterwards, and about that time, the residents of said valley commenced to inclose and fence their lands:

and about that time, and before defendants made any claim to the land or ditch, the plaintiff commenced to inclose and fence the land in dispute, and since then has distinctly completed marking the boundaries of said land, and has partly inclosed said land, and has with reasonable diligence prosecuted the work of fencing and inclosing the same, then the jury must find for the plaintiff. In deciding the question of reasonable diligence, the jury are entitled to consider the situation and character of the land and the ability and means of plaintiff."

It was proper for the court to admit any testimony tending to show that it was unnecessary to inclose the land in question; as that, in accordance with a custom universally acquiesced in, stock was herded by the owners during the growing and harvesting seasons. (*Courtney v. Turner*, 12 Nev. 350.)

But testimony showing that the farmers of the valley recognized and respected the boundaries of each other's ranches, notwithstanding no boundaries were fixed or known, and although there were no inclosures, was inadmissible; and all instructions were erroneous which informed the jury that they might consider any well known and recognized custom known and acted on by the parties, as to the manner of claiming and holding land by possessory title.

Trespass is an action for injury to plaintiff's possession. The possession necessary as to public lands may be actual or constructive. If it be the former, in order to recover, he must show that he has performed such acts as are necessary in order to subject the land to his dominion and control—such acts as are essential to its beneficial enjoyment.

Constructive possession of such lands can be had only by a compliance with the possessory act of this state. An agreement or custom among the farmers of Smith's Valley prior to 1875, that they would respect the boundaries claimed by each, notwithstanding no boundaries were fixed or inclosures made, and that each might claim and hold by possessory title without taking the steps required by law, did not take the place of acts requisite in order to constitute constructive possession; nor did such agreement or custom excuse the failure to perform what was necessary under the

law to constitute such possession. It was an effort to hold public land by constructive possession, against the very terms of the statute, which declares that "no person shall be entitled to maintain any such action for possession of, or injury to, any claim, unless he or she occupy the same, and shall have complied with the provisions of the third and fourth sections of this act." (Stat. 1864-5, 343.)

Although plaintiff did not attempt to show a compliance with the possessory act last referred to, he still urges that his possession and title are ample to maintain this action against defendants, for the following reasons: 1. Because plaintiff resided upon the land, cultivated twenty acres in alfalfa, and three acres as a garden; had a part actually inclosed with a substantial fence—that is to say, the twenty-three acres just mentioned, and held title of record to the whole, which extends his possession to the limits of his claim as defined by his deeds; 2. Because until 1874 the land was claimed and held under a general custom universally prevailing and recognized in the neighborhood, and after the custom ceased he proceeded with reasonable diligence to inclose his land with a substantial fence; 3. Because the land was sufficiently inclosed, and the boundaries marked, to create a possessory right.

We shall consider these three reasons in the order stated. The first is not good for the reasons given in *Wolfskill v. Malajowich*, 39 Cal. 280, and in *Eureka M. Co. v. Way*, 11 Nev. 182.

In answer to the second we shall add nothing to what has been said as to the effect of the custom or agreement between the ranchmen. But if it should be admitted, that until 1874 or 1875, such custom supplied the place of actual or constructive possession, still the testimony would not show that subsequent to that date, plaintiff either subjected the land over which the ditch was constructed to his dominion and control, or that he proceeded with reasonable diligence to do so. Under this head we content ourselves with the statement, that plaintiff did not have actual possession at the time of the alleged trespass, and shall defer an examination of the testimony upon the point until we consider the third reason above stated. It is necessary, however, to

Opinion of the Court—Leonard, J.

consider the claim that he proceeded with reasonable diligence to subject the land to his control. It being true that at the time of the alleged trespass, the land was not in the actual or constructive possession of plaintiff, the burden of proof was upon him to show that he had proceeded with reasonable diligence in an effort to acquire such possession, and in the absence of such proof, diligence cannot be presumed. Upon this point plaintiff testified as follows: "The fence on the south and west sides of the Hall & Sampson tract was sold by me soon after I bought it, in 1865; soon afterwards the old house or cabin was also taken down and hauled away in 1865; no buildings were ever afterwards put upon the Hall & Simpson tract; the land was never inclosed afterwards until about two years ago; I then began to inclose the remaining portion of the two tracts; * * * I hauled some posts and began to set them for the purpose of making a wire fence; I dug the post-holes along the south side of the ranch from the alfalfa field to the south-west corner of the Hall & Simpson tract, and from said corner northerly to a point intersecting Dobe Smith's ranch; I set up some of the posts, but not all of them; did not set any posts for a year or more prior to this controversy; about the time when they were constructing the ditch I was setting posts along the western boundary of my six hundred and forty acres, to and across the course of the ditch; * * * I have been fencing my land as fast as I could for the past two years; I was not able to have any help, and had to do the work myself; there were posts set up on my west line north of where the defendants dug their ditch. Some of the posts had been broken down since they were set two years ago; those that had been broken down or displaced had not been replaced; there was probably a quarter of a mile on the west side, where the posts had not been set up; the posts were on the ground; they were hauled there two years ago and the post-holes dug; * * * no crop of any kind had been cultivated on the Hall & Simpson tract since 1865, and no crop had been grown or harvested upon any of the land outside of the alfalfa field and garden since 1871, except that I turned some water

out of my ditch on the land to make the wild grass grow upon it; I also sowed some timothy seed on the land among the sagebrush, so as to fit the land for grazing purposes; other people's cattle, as well as my own, grazed upon the land, when there were any in the valley; it was too much trouble, and would not pay, to herd them off; * * * there were several reasons why I did not cultivate the whole of the six hundred and forty acres; I did not have water enough; I was too poor to hire help to grub out the brush, inclose the land and put in crops; I found it necessary to hire out sometimes in order to make a living for myself and family; I have a wife and one child; * * in 1876 I farmed in Mason's valley, in this county; no one worked on my place except what my wife did; she resided on the place in Smith's valley during my absence, and worked the garden and attended to the alfalfa field."

T. B. Smith testified for plaintiff, that "the latter had lived on the Rivers ranch since 1870 or 1871; that he had been away part of the time working for wages; that he supposed he did not fence his ranch because he was too poor."

The above is all of the testimony of plaintiff, showing diligence, subsequent to the time the post-holes were dug, and a part of the posts set, two years or more prior to the alleged trespass.

Defendants' testimony accords with plaintiffs. They testified that "after the placing of the posts two or three years ago, Rivers did nothing more to reclaim the land outside of the field and garden, until this spring (1877), when he grubbed out the sagebrush from eight or ten acres next west of the field, and about seventy rods southerly from the ditch; the posts have never been connected by any boards, wires or anything else so as to make a fence. When we were digging the ditch, Rivers set up a few posts on the west side of the six hundred and forty acre tract—probably twenty in all."

We have stated all the testimony tending to show diligence; and in our opinion, instead of showing that he proceeded with reasonable industry to subject the land to his control, by the prosecution of such work as was necessary to

Opinion of the Court—Leonard, J.

its complete enjoyment, it plainly shows an inexcusable want of diligent labor. True, plaintiff testified that he inclosed the land as rapidly as he was able; but he stated no single act, or effort of his in aid of such result, for a period of two years or more. He did not even keep the posts standing that had been set. He did not make an additional mark upon what he now claims as his boundary line, during that long period of time. At the trial he did not know where his boundaries were, except from the records of the surveys, and he admitted that when he set his posts he did not follow the lines of the surveys. In 1876 he left the land and cultivated another ranch in another valley. He went to California during the two years, and was absent about four months. It is said that he was poor and unable to inclose the land. If he was unable to employ help, that fact would excuse him for not hiring, but it does not excuse him for not being diligent himself. If a man is poor, he should claim no more of the unsurveyed public domain than, within a reasonable time, he can subject to his dominion; then if he diligently pursues his work, the law will protect him, although, if ejected, he may not be able to show that he has secured an actual possession. (*Staininger v. Andrews*, 4 Nev. 70.)

We now come to the third reason stated above in support of the claim that plaintiff's possession was sufficient.

That an inclosure was necessary, subsequent to 1874, whether the land was used for agricultural or grazing purposes, is evident; and that in the absence of a proper fence, it was not subjected to the will and control of the plaintiff is equally certain. As we have seen from plaintiff's testimony, other people's cattle grazed upon the land whenever there were any in the valley; and there is no proof that the custom of herding off the stock has existed for two years or more. S. M. Burbank testified that "the land claimed by plaintiff, for the last ten or twelve years had been used as a common for grazing purposes, without any objection being interposed that he ever heard of," and his testimony was not disputed.

We do not deem it necessary to follow the witnesses in

Opinion of the Court—Leonard, J.

their description of the boundaries marked, the posts set, etc. It was not claimed that there was an inclosure of any portion of the land upon which the ditch was dug. On the south side of the two tracts, posts, two rods apart, were set in 1874 or 1875. On the west side post-holes were dug the entire distance; post were set a part of the way, and were scattered upon the ground throughout the remaining portion of that side. On the west side many of the post-holes had been filled by gravel, and for a long distance north of the ditch there were few, if any, signs of a marked boundary of plaintiff's claim. From the north-east corner southerly there was a distance of forty rods with no boundary line, except a ditch belonging to defendants, while the next forty rods southerly had no boundary but a public road. Throughout the whole eighty rods just mentioned, there was not a post-hole, post or fence of any character.

T. B. Smith, a witness for plaintiff, testified that plaintiff had posts set up, and post-holes dug, and ditches, to mark the boundaries; that the lines could be easily distinguished by these marks. But upon cross-examination he stated that he did not know the boundaries; that he had been over it very little; never saw or looked for any monuments; had never been around the six hundred and forty acres, and could not say how far it was inclosed, except the field and garden; had seen a few posts at the west end; did not know how far the east end was marked by posts, monuments or fences other than the willow fence around the garden and field; that the land along the course of the ditch, though once cultivated, was then overgrown with sage-brush, grease-wood and rabbit-brush, and bore a strong resemblance to the outside lands; that the brush was not quite as large, though much of it was two feet high.

In my opinion the testimony would not have justified a verdict for plaintiff had the ground been timber-land and the action been trespass for cutting and carrying away timber therefrom. (*Eureka M. Co. v. Way*, 11 Nev. 174.) In such a case, it is established that an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located is all that is

Opinion of the Court—Leonard, J.

necessary. (*McFarland v. Culbertson*, 2 Nev. 282; *Eureka M. Co. v. Way*, *supra*.) In the last case the court says: "Without here entering into the details of the testimony, it may be stated in general terms that for more than a quarter of a mile on the south line between the bluff of rocks and the summit of the mountain, there are no blazed trees to designate the boundary, and for a distance of one thousand two hundred and sixty feet from the south-west corner, along the western line, over a smooth, grassy plot, there is no monument, tree or anything else to mark the line. (p. 175.)

* * * That natural boundaries, when taken in connection with artificial, are sufficient to mark the boundaries of timber-land, will not be disputed; but the artificial boundaries must be made in such a manner as to clearly mark and define the line, and must connect with the natural boundaries in such a way that any person going upon the land could, by following the marked lines, tell the precise extent of the land located and claimed, and the claimant must be an actual occupant within such boundaries." (p. 182.) And on page 176 it is said: "In the absence of a perfect inclosure, it is certainly essential that the boundary lines should be so clearly marked and defined that the same could be readily traced, and the extent of the claim easily known, and no stretch of the imagination could be so extended as to authorize any court to hold that the boundary lines were so marked and defined around the land in question. How could a stranger crossing the smooth, grassy spot designate the boundary? There is no fence, no string of brush or felled trees, no mark or monument for a distance of a quarter of a mile. Almost the same condition of the boundary is found on the south line, between the bluff of rocks and the south-west corner. A stranger in entering would discover no visible signs of any designation of boundaries whatever. The law does not require speculation upon these points. The acts necessary to clearly mark the boundaries must be done in order to notify strangers that the land is located. Otherwise any person would have as much right as the claimant to enter upon the land, cut the wood and timber thereon and take the same away."

Opinion of the Court—Beatty, J.

But the land in this case is not timber land, and requires more than a marking of the boundaries before it can be said to be subjected to the dominion of plaintiff. For a period of two years prior to the alleged trespass, it could have been put to no exclusive, valuable use by plaintiff without inclosing it. It is not pretended that he did have its exclusive use for any purpose. It follows that plaintiff did not have possession of the land over which defendants dug their ditch, and consequently that he was not entitled to recover damages in any sum.

The injunction is dissolved, and the judgment and orders appealed from are reversed.

[No. 909.]

**SAMUEL F. THORNE, RESPONDENT, v. E. D. SWEENEY
ET AL., APPELLANTS.**

INJUNCTION—NOMINAL DAMAGES—COSTS.—An appeal having been taken in this case from an order refusing to dissolve the temporary injunction, and that order having been reversed upon the ground that an injunction should not issue to prevent merely nominal damages (12 Nev. 251), and the court below having, upon the same facts, at the final trial, rendered judgment in favor of plaintiff for one dollar damages, for costs, and a perpetual injunction: *Held*, that the court erred in rendering judgment for costs and decreeing a perpetual injunction.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

T. W. W. Davies, for Appellants.

Robert M. Clarke, for Respondent.

By the Court, BEATTY, J.:

This is the same case that was formerly here on appeal from the order refusing to dissolve the temporary injunction. (12 Nev. 251.) After the decision of that appeal the case was tried in the district court, and a final judgment

Opinion of the Court—Beatty, J.

rendered in favor of the plaintiff for one dollar damages, for his costs of suit, and for a perpetual injunction. From that judgment, and from an order denying their motion for a new trial, the defendants appeal.

Objection is made by the respondent to the consideration of the appeal from the order refusing a new trial upon the ground that notice of the motion was not given in time. This objection is without merit unless it should be held that the case was tried by a jury. The fact is that certain special issues were submitted to and found by a jury, but no general verdict was rendered, and there was no finding as to what, if any, damage had been caused by the alleged trespasses of the defendants. Upon the rendition of the special verdict, the case was continued for argument, and after argument held under advisement by the court. Finally a judgment was filed by the judge, in which were recited the findings of the jury and his own findings and conclusions. Thereupon the plaintiff's attorney served upon the attorney for the defendants a written notice of the filing of the decision, and within ten days thereafter notice of their intention to move for a new trial was filed and served by defendants.

We think this was a case tried by the court within the meaning of the statute (C. L. 1258), and that the notice was in time. But whether it was or not is of no consequence; for the appeal from the judgment presents the only question which it will be necessary to consider.

The special verdict of the jury and all the findings of the court are incorporated into the judgment, and are thus made a part of the judgment-roll; and it appears therefrom that a perpetual injunction has been granted upon the identical facts which we decided on the former appeal afforded no ground for an injunction.

The decision of the district judge seems to have been based entirely upon a finding of the jury that the defendants failed to comply with one of the requirements of the statute relating to the condemnation of the right of way for flumes and ditches, by not keeping good their tender of the amount awarded as damages by the arbitrators. But our decision

Opinion of the Court—Beatty, J

was that, independent of all questions concerning the constitutionality of that act, and of course without any regard to the question whether or not it had been complied with, an injunction ought not to issue to prevent a merely nominal damage. The judgment shows that there has been no actual damage caused by the construction and operation of the ditch and flume of the defendants, and it follows from our former decision, which has become the law of the case, that a prayer for an injunction should have been denied. It follows, also, that it was error to allow the plaintiff to recover costs. (C. L. 1539.)

The judgment is reversed and the cause remanded with instructions to the district court to modify its judgment by striking out so much thereof as allows a recovery of costs, and all that part relating to the injunction.

VOL. XIII.—27.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1878.

[No. 930.]

STATE OF NEVADA EX REL. JOHN W. FOX v.
W. W. HOBART.

STATE PRISON—WARDEN AUTHORIZED TO EMPLOY PHYSICIAN—STATUTES 1877, 66, CONSTRUED.—In construing the acts to provide for the government of the state prison (statutes 1877, 66): *Held*, that the authority to employ a physician is vested in the warden under the clause conferring upon him the power to appoint “all necessary help.”

APPLICATION for *mandamus*.

The facts are stated in the opinion.

T. W. W. Davies, for Petitioner.

John R. Kittrell, for Respondent.

By the Court, BEATTY, J.:

The relator was appointed physician to the state prison by the board of state prison commissioners, and his account for services as such physician has been allowed by the board of examiners. He prays for a writ of *mandamus* to compel the respondent, who is state controller, to draw his warrant on the treasurer for the amount so allowed. The ground upon which the respondent refuses to draw his warrant is

Opinion of the Court—Beatty, J.

that the right to appoint a physician to the prison, belongs to the warden of the prison (who has made another appointment), and not to the board of commissioners. This proceeding is an amicable one, instituted for the purpose of obtaining a construction of the law, and all the facts necessary to present the single question as to where the power of appointment resides, are admitted. If it belongs to the board of commissioners, it is conceded that the writ should issue; if it belongs to the warden the petition must be dismissed.

By section 21, article 5, of the constitution, the governor, secretary of state, and attorney-general are constituted a board of state prison commissioners, but they are to have only such supervision over matters connected with the prison as may be provided by law. It is to the statutes, therefore, that we must look for a definition of their powers. Under the act of 1873 (Stats. 1873, 18) they were invested with very extensive and general authority, including the right to appoint a warden and "all necessary help." But by the act of the last legislature (Stats. 1877, 66) a radical change in the government of the prison was effected. The power of appointing the warden was taken from the commissioners and vested in a joint convention of the two branches of the legislature; and upon the warden so to be chosen was conferred the power to appoint and remove the deputy warden, and "all necessary help" at the prison.

In place of the general supervisory authority formerly exercised by the commissioners their powers were enumerated and limited as follows: "They shall have full control of all the state prison grounds, buildings, prison labor, prison property; shall purchase, or cause to be purchased, all needed commissary supplies, all raw material and tools necessary for any manufacturing purposes carried on at said prison; shall sell all manufactured articles and stone, and collect money for the same; shall rent or hire out any or all of the labor of the convicts, and collect the money therefor." (Stats. 1877, 66, sec. 1.)

If the power to appoint a physician is not embraced in these provisions—and clearly it is not—there is nothing in

Opinion of the Court—Beatty, J.

the existing law under which the commissioners can claim to exercise it. Their general supervising powers have been abolished, and their power to appoint "all necessary help" at the prison has been transferred to the warden. He alone, in our opinion, has authority to employ a physician for the prisoners.

It follows that the petition must be dismissed, and it is so ordered.

[No. 859.]

GEORGE T. DAVIS, RESPONDENT, v. C. N. NOTWARE,
ET AL., APPELLANTS.

DEFENSE TO PROMISSORY NOTE—EXISTENCE OF JUDGMENT CANNOT BE SHOWN BY PAROL TESTIMONY.—The defendant claimed that the consideration of the note sued on was the sale of certain timber and other property, and offered by parol testimony to show that the timber was lost in an action at law to determine the right of property therein: *Held*, that the fact of such a suit or the judgment therein, could not be proved by parol.

IDEM—COUNTER-CLAIM.—A demand of one of several defendants cannot be pleaded as a counter-claim to a demand upon which they are jointly liable unless there is an agreement that it shall so operate.

IDEM—AGREEMENT CONSTRUED.—The agreement relied upon to establish a counter-claim, provided that any sum found to be due from Davis & Freeman to W. F. Davis (defendant) should remain in the hands of D. & F. until the note sued on has been paid, and until all claims against D. & F. for certain indebtedness are paid: *Held*, that by the terms of said contract the indebtedness therein mentioned was not to be credited upon the note.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

Ellis & King, for Appellants.

R. M. Clarke, for Respondent.

By the Court, BEATTY, J.:

This is a suit to recover the unpaid balance of a promissory note of which plaintiff is the assignee. By way of defense to the action the answer alleges: 1. That the consid-

Opinion of the Court—Beatty, J.

eration of the note was the sale of certain timber and other property; that the vendors had no title to the timber (which was invoiced at one thousand and seventeen dollars) and that the defendants therefore lost it; 2. That at the time of the making of the note the payees were indebted to one of the defendants, and that it was agreed, as part of the transaction, that said indebtedness should operate as a credit upon the note.

Plaintiff recovered a judgment for the full amount claimed by him, and the defendants appeal relying upon two assignments of error in the rulings of the district court.

The statement shows that on the trial the defendants offered to prove that the timber mentioned in the answer was lost through the result of a lawsuit brought to determine the right of property therein. The plaintiff objected to parol testimony as to the fact of the suit or the judgment therein, and the objection was sustained. There can be no doubt that this ruling was correct. The only ground upon which counsel contends that it was erroneous is, that parol testimony was necessary to identify the timber which was lost with the timber for which the note was given. No doubt parol testimony would have been necessary and competent for that purpose, but the ruling of the court was not made upon any such offer.

The next assignment of error relates to the counter-claim of the defendant, W. T. Davis, which, as the answer alleges, was by agreement of the parties to operate as a credit on the note.

The agreement relied upon in support of this allegation was a contract in writing between the defendant Davis upon the one part and the payees of the note upon the other part, which was executed at the same time as the note. It appears therefrom that at that time there were some unsettled accounts between Davis and said payees, and that the balance was understood to be in favor of Davis. Among numerous other stipulations relating to a variety of matters, the contract contains the following: "Also to permit any sum of money found to be due from Davis & Freeman to said W. T. Davis to be and remain in the hands of said

Opinion of the Court—Beatty, J.

Davis & Freeman or said Gillson, as receiver, until a certain note for thirteen thousand five hundred and sixteen dollars and sixteen cents (the note in suit) made by W. T. Davis and C. N. Noteware, and payable to George Gillson, as receiver, has been paid, and until all claims against said firm of Davis & Freeman, or Davis, Freeman & Co., for indebtedness of the aforesaid stores, are fully settled and paid. In consideration whereof the said Davis & Freeman and George Gillson agree to make said sale to said C. N. Noteware and W. T. Davis," etc.

Having proved this contract, the defendants next offered to prove the amount of the indebtedness of Davis & Freeman to the defendant W. T. Davis; but the testimony was objected to by plaintiff and excluded by the court on the ground that by the terms of the contract said indebtedness was not to be credited upon said note, and was not due or demandable until after the payment of said note. We think the ruling of the court was correct.

In the absence of any special circumstances calling for the exercise of the equitable powers of the courts, a demand of one of the several defendants cannot be pleaded as a counter-claim to a demand upon which they are jointly liable, unless there is an agreement that it shall so operate. This seems to have been thoroughly understood by the defendants who expressly allege such an agreement in their answer.

The proof, however, failed to sustain the allegation. The stipulation above quoted does not enlarge, but rather restricts the rights of Davis as to the enforcement of his demand. If, independent of his agreement he could have relied upon it as a counter-claim in this action, we might not feel obliged to hold that he was thereby precluded from doing so, although a narrow and literal construction of the contract would sustain that view. But, as we have said, and as seems to be conceded, the statute (C. L., 1110,) does not authorize the demand of one defendant to be set-off against a demand upon which he is jointly liable with another unless it arises out of the very transaction upon which the plaintiff's claim is founded. Here there can be no pretense that the claim of the defendant Davis arose out of the trans-

Points decided.

action in which this note was given. The indebtedness to him existed before the sale of the property or the execution of the note, and there was no sort of connection between the two demands except that created by the stipulation above quoted, and the effect of that was merely to oblige Davis to abstain from collecting his demand until the affairs of Davis & Freeman were settled up.

It is contended, however, that to sustain the ruling of the district court on this ground, is to allow the respondent to avail himself of an objection to the testimony which was waived by the failure to state it at the time when the testimony was offered. It is urged that in the district court no objection was made upon the ground that a several demand cannot be pleaded as a counter-claim to a joint liability; but, on the contrary, that the only objection was that the agreement did not provide for crediting Davis' claim on the note.

There is no ground for this complaint. The objection was broad enough and specific enough for the occasion. The only ground upon which it was claimed in the answer that the demand of Davis could be set off against the joint liability of the defendants was that it had been agreed that it should be credited on the note; and it was sufficient for the plaintiff to object that no such agreement had been proved. It was not necessary that he should state the rule of law as part of his objection.

The judgment and order appealed from are affirmed.

[No. 933.]

EX PARTE MARTIN COHN.

TAX ON FOREIGN INSURANCE COMPANIES—CONSTITUTIONAL.—In construing the provisions of the act to regulate and tax foreign insurance companies (2 Comp. Laws, 3947): *Held*, that the imposition of the percentage on premiums is a tax upon the business of the insurance companies, and is not repugnant to the provisions of article 10 of the state constitution. (*Ex parte Robinson*, 12 Nev. 263, affirmed.)

HABEAS CORPUS before the Supreme Court.

Argument for Respondent.

The facts are stated in the opinion.

C. H. Bellnap, for Petitioner.

I. The title of the act, as well as its express terms, shows that one of its objects is to impose a tax upon foreign insurance companies. The distinction between a tax and a license-fee is marked. License is an exercise of the police power of the state; its object is regulation; a right to license does not confer a right to charge a license-fee therefor, for the purpose of revenue. But taxes are imposed for the purposes of revenue only. (*Cooley on Taxation*, 408; *Cooley on Cons. Law*, 201.) The imposition of license-fees has always been held to be in the exercise, not of the taxation power of the state, but of its police power, and are imposed, not upon property, but upon trades, professions and occupations. (*People v. McCreery*, 34 Cal. 448; *Chitren v. People*, 11 Mich. 50; *Ex parte Robinson*, 12 Nev. 263.)

II. The first portion of article 10 of the constitution applies to all taxation; and that portion which requires a just valuation of property applies by its very terms only to property.

III. But a tax upon premiums is a tax upon money, and, therefore, a tax upon property. (*Glasgow v. Rowse*, 43 Mo. 490.)

John R. Kittrell, Attorney-general, *Frank V. Drake*, District Attorney of Storey County, and *Robert M. Clarke*, for Respondent.

Article 10 of the constitution has no application to taxes imposed upon non-resident corporations for the privilege of doing business in this state. (*Ex parte Robinson*, 12 Nev. 263; 1 Cal. 233; 28 Id. 360; 34 Id. 447; 3 E. D. Smith, 440; 12 B. Monroe, 218; 99 Mass. 148; *Baker v. Cincinnati*, 11 Ohio St. 534; *Bright v. McCullough*, 27 Ind. 223; *Kitson v. Mayor etc.*, 26 Mich. 325; *Glasgow v. Rowse*, 43 Mo. 479; *Sacramento v. Crocker*, 16 Cal. 119.) A foreign corporation has no right to carry on business in this state without the consent of the state. (*Degroot v. Van Duzer*, 20 Wend. 390; *Blackstone Mfg. Co. v. Inhabitants etc.*, 13 Gray, 488; *State*

Opinion of the Court—Hawley, C. J.

v. *D. L. & W. R. R. Co.*, 30 N. J. 473; *Atterberry v. Knox*, 4 B. Mon. 90; *Day v. Newark Ind. Rub. Co.*, 1 Blatch. 632; *Commonwealth v. Milton*, 12 B. Mon. 212; *Bank of Augusta v. Earle*, 13 Peters, 588; *Paul v. Virginia*, 8 Wall. 168-81.)

III. The state has the power to impose a tax upon foreign insurance companies for the privilege of doing business in this state. (*Angell & Ames on Corp.* sec. 486 a; *Attorney-general v. Bay S. M. Co.*, 99 Mass. 148; *Blackstone Mfg. Co. v. Inhabitants etc.*, 13 Gray, 488; *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *Commonwealth v. Milton*, 12 B. Monroe, 212; 1 Cal. 233; 4 Id. 48; 28 Id. 360; 34 Id. 447; *In re Comstock*, 3 Sawyer, 218; *Paul v. Virginia*, 8 Wall. 181; *Ducat v. Chicago*, 10 Wall. 410-15.)

By the Court, HAWLEY, C. J.:

Petitioner claims that the "act to regulate and tax foreign insurance companies doing business in this state" (2 Comp. Laws, 3947), is in violation of the provisions of article 10 of the state constitution, in this, that it imposes "a tax of two per cent. on the amount of gross premiums" collected from fire and inland risks, and of "one per cent. on the amount of premiums" collected from life risks on all insurance companies incorporated under the laws of other states or foreign governments, whilst the insurance companies incorporated under the laws of this state are not required to pay such tax.

This is the only point argued or relied upon by petitioner's counsel. It is conceded that in all other respects the law in question is in conformity with the provisions of the federal and state constitution. It is admitted (as decided by the supreme court of the United States in *Paul v. Virginia*, 8 Wal. 168, and affirmed in *Ducat v. City of Chicago*, 10 Wal. 410) that a corporation has no legal existence beyond the limits of the sovereignty where it is created, and is entirely dependent upon the comity of other states to which it migrates.

Now if a sovereign state may, under the federal constitution, exclude the foreign corporation entirely, then it necessarily follows that—as long as it keeps within the limits

Points decided.

of its own constitution—it may impose any terms or conditions it pleases in giving its assent to such corporation to transact business within the limits of the state. The supreme court of this state, in *Ex parte Robinson*, 12 Nev. 263, decided that article 10 of the state constitution “refers particularly to the levy of *ad valorem* taxes,” and does not apply “to licenses imposed for conducting any business or profession.”

We are of opinion that the imposition of the per centage on premiums in the insurance law is a tax upon the business of the insurance companies. It is a condition precedent to the right of a foreign insurance corporation to do business within the limits of this state, and is not an *ad valorem* tax on property, and hence, upon the principles decided in *Ex parte Robinson*, is not repugnant to the provisions of article 10 of the state constitution.

The petitioner is remanded.

[No. 913.]

J. F. SMITH, RESPONDENT, v. JAMES MAYBERRY,
APPELLANT.

CONTRACT FOR CUTTING WOOD—ASSIGNMENT BY SUB-CONTRACTORS.—One Johnson had a contract with the P. W. L. & F. Co., for cutting wood. Smith (plaintiff) and one Russell were sub-contractors under him. Johnson assigned the contract to the defendant, who agreed to pay the sub-contractors; they assenting to the arrangement released Johnson and accepted Mayberry in his place; subsequently Russell assigned his rights under the contract to plaintiff: *Held*, that the court did not err in overruling a demurrer to the complaint, on the ground that it did not aver that the assignment from Russell was made with defendant's assent.

NEW TRIAL—CONFLICT ON EVIDENCE.—An order of the district court refusing to grant a new trial will not be reversed by the appellate court, upon the ground that the verdict is not sustained by the evidence when there is a substantial conflict in the testimony.

KNOWLEDGE OF SUB-CONTRACTOR AS TO TERMS OF PRINCIPAL CONTRACT IMMATERIAL.—If a sub-contractor has knowledge of the terms of the principal contract, that fact does not tend to prove that he contracted upon the same terms.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Boardman & Varian, for Appellant.

W. L. Knox and Wm. Webster, for Respondent.

By the Court, BEATTY, J.:

The substance of the complaint in this action is that one Johnson had a contract with the Pacific Wood, Lumber and Flume company for the cutting of saw-logs and cord-wood on the lands of the company; that the plaintiff and one Russell were sub-contractors under him; that while they were engaged in the performance of their contract with Johnson he assigned his contract with the company to the defendant, who, as part of the consideration therefor, agreed to pay the sub-contractors on the completion of their contract; that they assented to this arrangement, released Johnson and accepted Mayberry in his place; that subsequently Russell assigned all his rights under the sub-contract to the plaintiff, who went on and fully performed their agreements; that he thereupon demanded the contract price for the work done, but was refused payment. Wherefore suit is brought.

To this complaint defendant demurred upon the ground that it failed to show a cause of action. He now contends that the district court erred in overruling his demurrer, because there is no allegation in the complaint that the assignment from Russell to plaintiff was made with his assent. No reason is stated why his assent was necessary, and none has occurred to us. We think that the plaintiff, if he performed the contract under the assignment from his co-contractor, is entitled to recover, whether Mayberry assented to the assignment or not.

The defendant in his answer alleges a contract different from that set up in the complaint, and denies that it was performed according to its terms, or that he ever derived any benefit from its partial performance.

Upon this issue there was a direct, and, as it appears to us, a pretty equal conflict in the testimony, and the district court having denied the motion for a new trial, we cannot reverse its order on the ground that the verdict is not sustained by the evidence.

Points decided.

One thing that the defendant undertook to show on the trial was, that the plaintiff and Russell contracted to "clean up" the land from which they were to cut wood and timber "to the satisfaction of the Wood and Flume company," and that they were not to be paid until the company accepted their work; and he did prove that the company refused to accept the work of plaintiff, for the reason, as alleged, that he had not properly cleaned up the land.

The plaintiff proved, however, by the testimony of a number of experts, that he cleaned up his land as well or better than was usual in the business; and he and Johnson both testified that although their contract was that the land should be properly cleaned up, there was nothing said between them about satisfying the Flume company. On cross-examination of Johnson he was asked (in substance) if the plaintiff was not aware, at the time he took the sub-contract, of the terms of the contract with the company (which, it seems, did require the land to be cleaned up to its satisfaction, and made the payment of Johnson to depend upon its acceptance of his work). This question was objected to by the plaintiff, and his objection was sustained by the court. We cannot say that the ruling was erroneous. The fact, if it is a fact, that plaintiff knew the terms of the principal contract, would not have tended to prove that he contracted in the same terms. As a means of testing the accuracy of the witness it was perhaps within the discretion of the court to allow the question, but its exclusion was not an abuse of discretion.

The judgment and order overruling the motion for a new trial are affirmed.

STATE OF NEVADA EX REL. S. M. AND S. E. BURBANK
v. J. S. JAMESON, JUDGE OF THE EIGHTH JUDICIAL
DISTRICT.

CRIMINAL ACTION—JUDGMENT FOR COSTS—WHEN NUGATORY.—Relators were found guilty of assault and battery, fined in the sum of one hundred dollars each "and the costs of this action:" *Held*, that this was only a judgment for the amount of the fine; that the judgment relating to costs, the amount not being stated, was surplusage and nugatory.

Opinion of the Court—Beatty, J.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts appear in the opinion.

Ellis & King and D. J. Lewis, for Petitioners.

By the Court, BEATTY, J. :

The relators were indicted for an assault with deadly weapons; they were convicted of a simple assault, and sentenced by the respondent to pay a fine of one hundred dollars each and the costs of the proceedings. They now ask that the judgment be quashed upon the ground that the district court had no jurisdiction to add the costs of the criminal action to the fine.

We do not think that the addition of the costs would have been an excess of jurisdiction (St. 1867, 44; C. L. S. 3228) but it is unnecessary to discuss or decide the questions that have been argued by counsel, as we are of the opinion that so much of the judgment as relates to costs is utterly nugatory by reason of the failure of the court to state the amount of the costs in entering the judgment. The return to the writ shows that the judgment was entered as follows: “ * * It is therefore ordered, adjudged, and decreed by the court, that the said defendants, S. M. Burbank and S. E. Burbank, be and they are hereby fined in the sum of one hundred dollars each and the costs of this action.” This is a judgment for one hundred dollars against each of the defendants, and for no more. The amount of the costs not being stated, the words “ and the costs of this action,” are mere surplusage. No execution could issue for the costs and the defendants were not ordered to be imprisoned till they were paid.

There was no excess of jurisdiction, and it is therefore ordered that the proceeding be dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
OCTOBER TERM, 1878.

[No. 890.]

S. M. AND S. E. BURBANK, RESPONDENTS *v.* WEST
WALKER RIVER DITCH COMPANY, APPELLANT.

INJURIES CAUSED BY THE BREAKING OF A DITCH—VERDICT SUSTAINED BY THE EVIDENCE.—The facts of the case reviewed at length: *Held*, that the evidence supported a verdict in favor of plaintiffs.

IDEM.—*Held*, that the defendant was bound to provide against such floods as had occurred within its knowledge.

IDEM—CONTRIBUTORY NEGLIGENCE.—The plaintiffs were stockholders and officers of the corporation defendant; as such they frequently urged upon the trustees the necessity of fluming the west fork of Desert creek to prevent the injury which occurred; when overruled, they offered to do the work themselves and were threatened with personal violence: *Held*, that they were not guilty of contributory negligence.

PLEADINGS—PRESCRIPTIVE RIGHT.—Where the damages were not claimed on account of the mere existence of the ditch, but were claimed on account of the careless management of the ditch and neglect of defendant to provide proper means of discharging the waters of the west fork of Desert creek into their natural channel in case of flood: *Held*, that neither the pleadings nor the evidence entitled the defendant to raise the question of prescription.

STOCKHOLDERS CAN BRING SUIT FOR DAMAGES AGAINST CORPORATION.—

Where damages are claimed on account of mismanagement by the corporation against which the plaintiffs as officers and stockholders constantly protested: *Held*, that plaintiffs as stockholders could maintain the action.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

Argument for Respondent.

The facts are stated in the opinion.

Robert M. Clarke and M. A. Murphy, for Appellant.

I. The proofs totally fail to support the averments of the complaint. There is no pretense of any carelessness or negligence in using the ditch; nor that the waters brought into the ditch by the defendant caused any break in the banks of the ditch, or did the plaintiffs any damage whatever, nor that the ditch was not in good repair. On the contrary, it is shown that the ditch was ample for the use and purposes intended, and in place of carrying water upon the plaintiff's land, carried it away from them. The damage which the plaintiffs sustained was the direct and sole act of God, and for which the law holds no man responsible. (Wharton on Negligence, secs. 114, 115, 557, 558; 30 N. Y. 568, 639; 35 Cal. 416.) As no negligence is shown or pretended, except such as results from the mere existence of the property, there is absolutely nothing to support the verdict and judgment. (Shearman & Redfield on Negligence, sec. 2 and note, 6 and note; Wharton, secs. 557, 558; 34 Cal. 75.)

II. The defendants commenced their ditch before plaintiffs had their land; they have maintained and used it in the same place and manner, and with plaintiff's knowledge for more than fourteen years, and if its mere existence worked any injury to plaintiffs or their land, then such injury is prescribed against by lapse of time under the statute of limitations. (Angell on Water Rights, secs. 205, 206, 207, 208.)

III. The court erred in charging the jury that the defendant must so use its ditch as not to interfere with plaintiffs' rights. This instruction ignored the defendant's rights of prescription. (7 Cal. 339; 10 Id. 541; 34 Id. 75.)

Ellis & King and D. J. Lewis, for Respondent.

1. The verdict is for plaintiff, upon testimony competent and amply sufficient to support the verdict, and if the testimony is conflicting, the verdict must stand. (25 Cal. 404; 16 Id. 160; 21 Id. 414; *Treadway v. Wilder*, 9 Nev. 67.) It was the duty of the defendant to so manage and maintain

Opinion of the Court—Beatty, J.

its ditch as that no injury should befall the plaintiffs in consequence of the neglect of the defendant. (*Richardson v. Kier*, 34 Cal. 74.) If it appears that an injury has happened in any way, through the intervention of man, it cannot be held to have been the act of God. (*Polack v. Pioche*, 35 Cal. 423; *McArthur v. Sears*, 21 Wend. 190; *Fish v. Chapman*, 2 Geo. 349; *Merritt v. Earle*, 29 N. Y. 115; 25 Cal. 403.) The direct occasion of this damage was the failure to flume the channel. This was negligence upon the part of the defendant. (25 Cal. 403; 34 Id. 75.) Even if the instruction states the law too broadly the case should not be sent back for another trial, unless the defendant has been deprived of some right which ought to have, or might have, legally changed the result of the trial already had. The error, if any, was harmless. (*Robinson v. Imp. Co.*, 5 Nev. 44; *Cahill v. Hirschman*, 6 Id. 59; *Cayles v. C. P. R. R.*, 6 Id. 265; *Brown v. Lillie*, 6 Id. 244; *Sharon v. Minnock*, 6 Id. 377; *Blackie v. Cooney*, 8 Id. 41; *Menzies v. Kennedy*, 9 Id. 52; *State v. Donovan*, 10 Id. 36; *State v. Glover*, 10 Id. 24; *Gaudette v. Travis*, 11 Id. 49.) There is no question of limitation or prescription in this case.

By the Court, BEATTY, J.:

This is a suit for damages for injuries alleged to have been caused by the negligence of the defendant in suffering its irrigating ditch to break and flood the lands of the plaintiffs. The complaint contains the allegations usual in such cases; the answer denies that the plaintiffs were injured; denies that the defendant was negligent, and charges that the plaintiffs were, at the time of the alleged injuries, stockholders and officers of the defendant, and as such officers were managing the ditch and specially charged with the duty of keeping it in repair.

On these issues the case was tried. Plaintiffs recovered a judgment for upwards of eighteen hundred dollars. The defendant moved for a new trial, and, the motion being overruled, it appeals from the judgment and the order denying its motion.

It is claimed by appellant that the district court erred in

VOL. XIII.—28.

Opinion of the Court—Beatty, J:

refusing to order a new trial, because there was no evidence that it was guilty of negligence, or that the injury to the plaintiffs was caused or in any degree augmented by reason of its ditch; and because it was clearly shown that such injury as plaintiffs sustained was due solely to the act of God and their own culpable negligence; and because it also clearly appears that their injury was less serious than it would have been if the ditch had never been dug.

We think, however, that there is not only some evidence but a preponderance of evidence in favor of the plaintiffs on all these points. . .

There was evidence sufficient, we think, to prove the following state of facts: Defendant's ditch heads in the West Walker river, and extends for a distance of several miles in an easterly direction along the slope of the hills which lie to the south of that stream. It is so constructed as not only to divert water from the river, but also to intercept all the water flowing from the hills to the south of it. Instead of being connected by flumes across the ravines and water-courses by which it is intersected, it is made to dam up their channels and receive all the water flowing therein. Near its eastern or lower end it crosses two branches of Desert creek, known as the "East fork" and "West fork." These streams or channels head in the mountains to the south of Walker river, and, before the construction of defendant's ditch, emptied into that stream. Ordinarily they are either dry or contain but little water, but when there are heavy snows, followed by rains in the mountains, they are converted into torrents, and either branch brings down more water than the ditch can possibly carry, so that it must inevitably overflow or break. It has frequently broken, sometimes at one point, sometimes at another. Two or three years before the trial, there were waste-gates in the ditch at the points where it receives the east and west forks, but the waste-gate at the west fork having washed out, it was not replaced when the break was repaired. Instead of putting in a sufficient waste-gate to draw off the waters of the west fork in case of freshets, the embankment was made solid, and so high and strong that it has not broken since.

The consequence has been that in times of high water the ditch has broken near the crossing of the east fork, where the embankment is weaker, and discharged the flood from both branches of Desert creek upon the lands of the plaintiffs, which are situated on the east fork and below the ditch. It was proved that in their natural channel the waters of the west fork could not have reached the plaintiff's lands, and that those of the east fork alone would have caused them no material injury. But at four different times during the years 1875 and 1876 the flood from both branches was poured upon them through a break near the crossing of the east fork, and it is not disputed that they were damaged at least to the extent found by the jury. We think it clear upon these facts that the injury resulted from the negligence of the defendant, in failing to keep a sufficient waste-gate at the crossing of the west fork. The ditch not being of sufficient capacity to carry the waters of that stream when it is high, it was the duty of the defendant to provide a means for discharging them through their natural channel. Instead of doing so, they were diverted by the ditch and turned upon the plaintiff's land.

But it is contended that the floods of 1875 and 1876 were wholly unprecedented, and such as could not have been anticipated or provided against, and consequently that the injury to plaintiffs was solely due to the act of God.

It will not be necessary to decide whether the defendant would have been absolved if the floods had been of unprecedented violence, for the fact is otherwise. Witnesses now living in the valley testify to even greater floods having occurred within the last twenty years, and moreover, the ditch has been demonstrated to be insufficient on several occasions since its completion, notably, at the time the waste gate at the west fork was washed out. If the defendant was not bound to provide against unheard-of floods, he was at least bound to provide against such as had occurred not more than three years prior to the construction of its ditch. It had abundant warning in every way. The plaintiffs, as stockholders and officers of the company, frequently urged upon the trustees the necessity of fluming the west

Opinion of the Court—Beatty, J.

fork, in order to prevent the very results that have ensued, but they were always overruled by an adverse majority, and when they offered to do the work themselves, they were threatened with personal violence if they attempted it. This disposes of the charge of contributory negligence made in the answer. It is true the plaintiffs were president and foreman respectively of the defendant, and one of them a trustee at the time a part of the injury occurred. But it is very clearly shown not only that they had no power, but were expressly forbidden by a majority of the trustees, sustained by a majority of the stockholders, to provide any means for discharging the waters of the west fork into their natural channel in case of a flood.

An attempt was made at the trial to show that the plaintiffs had been guilty of negligence in other respects. It was proved that at the time of the floods they refused to open the waste-gate at the east fork; but it was not shown how the raising of that gate would have helped them, and so far as we can see, the only effect of it would have been to hasten their ruin. There was evidence also that the break occurred at the point where the plaintiffs had a box for drawing water from the ditch for irrigating purposes, and an attempt was made to show that by the improper construction or arrangement of this box the embankment was weakened and caused to break. The jury, however, under instructions drawn by the defendant, and quite as favorable as it was entitled to ask, found that there was no contributory negligence, and we think they were amply justified in concluding from the evidence that the ditch must inevitably have broken at the east fork in spite of everything that the plaintiffs could have done. In fact, it is a part of the appellant's argument that no human power could have prevented the ditch from breaking somewhere, and all the evidence shows that the embankment at the west fork was too strong and high to be overflowed or broken.

It was proved that the ditch below the east fork had a steeper grade, and consequently a greater carrying capacity than above that point. From this it is argued that it must necessarily have conducted away from plaintiffs' lands more

Opinion of the Court—Beatty, J.

water than it brought to them, and consequently that they were less injured than they would have been if there had been no ditch. As long as the embankment of the ditch was unbroken, no doubt it did carry away more water than it brought down to the east fork, but when the water it brought from the west fork, uniting with that of the east fork, washed out the embankment, it is probable that very little if any water continued to flow down the ditch to the eastward. It found a wider channel and steeper grade down the bed of the east fork.

These are all the points made on the evidence, and they are, as we have endeavored to show, without merit.

It is next claimed that the district court erred in charging the jury that time could not confer a right upon the defendant to injure the plaintiffs.

No prescriptive right of any sort is pleaded in the answer, but on the trial it was proved that the defendant's ditch was completed in 1864, and has been constantly in use during the irrigating season ever since.

It seems to have been contended in the district court, as it has been here, that the injury to the plaintiffs was caused solely by the mere existence of the ditch, coupled with the act of God in producing the floods. Hence it was argued that, since the defendant could not be held responsible for the act of God, if it could show a prescriptive right to maintain its ditch, its defense would be made out. Counsel therefore contends that the instruction referred to was erroneous, and deprived it of the benefits of one of its defenses.

It is unnecessary to decide whether the instruction would have been erroneous in the sort of case supposed. It is sufficient to say that neither the pleadings nor the evidence in this case entitled the defendant to raise the question of prescription. Damages were not claimed on account of the mere existence of the ditch, but on account of careless management of the ditch, and the negligence proved was the failure to provide a means of discharging the waters of the west fork into their natural channel below the ditch, whereby they were diverted into the east fork. This was the plaintiff's

Opinion of the Court—Beatty, J.

iff's case, and there was not a particle of evidence tending to prove that the defendant ever at any time exercised or claimed the right so to divert the waters of the west fork. It is true the danger has been impending ever since the west fork was securely dammed up and the waste-gate taken out, but no right of action accrued to the plaintiffs until the injury was done, and when it was done this action was commenced. Conceding that the instruction of the court may have been erroneous, it is a sufficient answer to the argument of counsel to say that its utmost effect was to take from the jury the question of prescription, and that is what ought to have been done.

The court also instructed the jury, in effect, that the plaintiffs were not precluded from maintaining this action by reason of the fact that when the injury occurred they were stockholders of the corporation.

The appellant does not deny that in general a corporation may be sued by its stockholders, but it is claimed that when an injury results to a stockholder, from the mere existence of the property of the corporation, it would be unjust to allow him to sell his stock and sue for damages.

This also presents a question which is not involved in the case. As has been shown, the injury to plaintiff did not result from the mere existence of the ditch, but from mismanagement, against which the plaintiffs constantly protested. We think that under the circumstances they had an undoubted right to maintain the action. And it makes no difference that they sold their stock before bringing suit. The purchaser of the stock alone, if anybody, can complain on that score.

The other points made by appellant are but a repetition of those which have been discussed, and are equally without merit.

The judgment and order appealed from are affirmed.

Argument for Respondent.

[No. 902.]

STATE OF NEVADA, EX REL. R. E. ARICK, RESPONDENT,
v. JOHN C. HAMPTON, TREASURER OF VIRGINIA CITY,
APPELLANT.

LEGISLATURE CANNOT EXERCISE JUDICIAL POWERS—CLAIMS AGAINST MUNICIPAL CORPORATIONS.—In construing the provisions of the act providing for the payment of outstanding indebtedness of Virginia City (Stat. 1844, 5, 325): *Held*, that said act, in so far as it undertakes to definitely fix the amount due to the persons therein named, is an attempt upon the part of the legislature to exercise judicial powers, and is repugnant to section 1 of article III of the state constitution.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

S. P. Scaniker, City Attorney of Virginia, for Appellant.

I. The proviso in the act evidently governs the whole act relative to Arick's claim, that he must surrender or offer to surrender his evidence of indebtedness, etc., before he could get his demand. (Potter's Dwaris on Stat. & Const. p. 118, notes; *Minis v. U. S.*, 15 Peters, 423; *Voorhees v. Bank of U. S.*, 10 Id. 471.) The legislature cannot make contracts for municipal corporations. (1 Dill. sec. 43; *Mayor and City Council of Baltimore v. Horn et al.*, 30 Md. 218; 33 Penn. St. 495; *McDaniel v. Correll*, 19 Ill. 226; *Reiser v. Tell Savings Fund*, 39 Penn. St. 144.)

R. H. Taylor, for Respondent.

I. The legislature had authority to pass the act of January 27, 1865. (Stat. 1864-65, 121, and that of March 9, 1865; Stat. 1864-65, 325; *United States v. R. R. Co.*, 17 Wall. 329; *Police Jury v. Skreveport*, 5 Lou. An. 661; *Gutzwiller v. People*, 14 Ill. 142; *County v. State*, 11 Id. 202; *Dennis v. Maynard*, 15 Id. 477; *Town of Guilford v. Sup. Chen. Co.*, 13 N. Y. 143; *Brewster v. City of Syracuse*, 19 Id. 116; *Darlington v. Mayer*, 31 Id. 190, 203; *State ex rel. St. Louis Police Comm. v. St. Louis County Court*, 34 Mo.

Opinion of the Court—Hawley, C. J.

546; 1 Dillon Mun. Corp., sec. 47; *Blanding v. Burr*, 13 Cal. 343.)

II. The claim of respondent is ascertained and definitely fixed by the act of March 9, 1865, and the payment thereof by the city treasurer, being a purely ministerial act, he can be compelled by *mandamus* to perform it. (Moses on Mand., 142, 208; *Case v. Wresler*, 4 Ohio St. 561; *State v. Lynch*, 8 Id. 347; *State v. Slaven*, 11 Wis. 153; High Ex. Leg. Rem., secs. 36, 104, 111, 112, 115, 116.)

By the Court, HAWLEY, C. J.:

The district court, upon the petition of respondent, issued a writ of *mandamus* to compel the appellant to pay respondent the sum of three hundred dollars, with interest, as provided in the act of the legislature approved March 9, 1865. (Stat. 1864-65, 325.)

It is argued by appellant that the court erred in refusing to sustain a demurrer interposed upon the ground that the petition did not state facts sufficient to constitute a cause of action.

The act of the legislature, after authorizing the treasurer to set apart certain moneys as a special fund and out of said fund to pay the indebtedness therein described (including the claim of respondent) provides: "that all the evidences of indebtedness held therefor, together with all warrants or other legal evidences of indebtedness, held as collateral security for the payment of the same, shall be surrendered to the city treasurer at the time of the payment thereof."

The petition is defective in failing to state that this provision of the law was complied with.

The respondent contends that his claim is ascertained and definitely fixed by the act in question and that it was the duty of the city treasurer to pay over the money whenever there was a sufficient amount in the special fund to pay the same without having the amount thereof ascertained by the courts, or by the municipal authorities of Virginia city. "The cases on this subject," says Dillon, "when carefully examined, go no further probably, than to assert the doctrine that it is competent for the legislature to compel

municipal corporations to recognize and pay debts not binding in law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation." (1 Dillon on Municipal Corporations, sec. 44, and authorities there cited.)

Dennis v. Maynard, 15 Ill. 477, is the only authority cited by respondent that goes to the extent that the legislature may ascertain and definitely fix the amount due and compel the municipal corporation to pay the same. In that case the money raised by taxation was to be applied to a public object, and several authorities hold that in cases where the public interests are alone involved the power of the legislature is greater than in cases which only concern private interests. It is unnecessary in this case to decide whether such a distinction is founded upon any substantial reason.

In *The People v. The Mayor of Chicago*, 51 Ill. 30, it was held that the legislature could not compel a municipal corporation, against its will, to incur a debt by the issue of its bonds for any local improvement.

By an examination of the authorities, which are quite numerous, it will be observed that in the discussion of this and kindred questions the courts are not entirely harmonious. We are, however, satisfied that in a case like the one under consideration, where only private interests are involved, it may be considered as settled, by the weight of authority, that the legislature cannot adjudicate upon disputed claims.

Cooley, after stating the general rule substantially as quoted from Dillon, and declaring that the legislature has no power, against the will of a municipal corporation, to compel it to contract debts for local purposes in which the state has no concern, says:

"And there is much good reason for assenting also to what several respectable authorities have held, that where a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to incur and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute

Points decided.

settled by the courts, and cannot be bound by a legislative allowance of the claim." (Cooley, Const. Lim. 233.)

In a note reviewing the authorities upon this subject he says: "It is one thing to determine that the nature of a claim is such as to make it proper to satisfy it by taxation, and another to adjudge how much is justly due upon it. The one is the exercise of legislative power, the other of judicial."

The act in question, in so far as it undertakes to definitely fix the amount due to the several persons therein named, is an attempt upon the part of the legislature to exercise judicial powers, and is repugnant to section 1 of article iii. of the state constitution.

The demurrer ought to have been sustained.

The judgment and order appealed from are reversed and cause remanded.

[No. 894.]

KATIE GLEESON, ADMINISTRATRIX ETC., APPELLANT, v. MARTIN WHITE MINING COMPANY, RESPONDENT.

MINING CLAIM—LOCATION OF, HOW MADE—COMPLIANCE WITH ACT OF CONGRESS.—Under the laws of congress, the location of a mining claim, on a vein, must be made by taking up "a piece of land" to include the vein. (HAWLEY, C. J., *dissenting*.)

IDEM—BOUNDARIES.—The boundaries and extent of the claim must be plainly defined by stakes or marks on the ground.

IDEM—REASONABLE TIME TO DEFINE CLAIM.—The surface claim is not required to be defined immediately upon the discovery of the vein; the locator is allowed a reasonable time for that purpose.

IDEM—VEIN THE PRINCIPAL OBJECT.—The vein is the principal object of the locator; the surface claim ought always to conform to its course; the end lines ought to be parallel, and at right angles to the side lines.

IDEM—MARKING OF CENTER LINE OF SURFACE CLAIM—Held, SUFFICIENT MARKING OF THE LOCATION.—Where the locators of a mine, having a monument, notice and work at the discovery point, post two stakes along the center line of the claim, one three hundred feet south-east of the location monument, marked "South-easterly stake of Paymaster," the other twelve hundred feet north-west of the location monument, and marked "North-westerly stake of Paymaster," these stakes being in a line with the croppings of the vein and discovery point: *Held*, a sufficient marking of the boundaries of the location of the claim "so that its boundaries can be readily traced."

13 442
15 152
15 384
19 410
14* 350

13 442
21 452
21 458
33* 660
33* 803
13 442
25 828

Argument for Appellant.

IDEM—LOCAL RULES AND REGULATIONS.—In order to secure the right of possession to a mining claim, there must be a compliance not only with the laws of the United States, but also with such local regulations of the mining district as are not in conflict therewith.

IDEM—SUFFICIENCY OF NOTICE AND OF LOCATION.—A notice of location, otherwise good, is not invalid because it does not contain a description of the claim by reference to some natural object or permanent monument; the law only requires that the record of the claim shall contain such description. It is a sufficient compliance with the law if the description of the *locus* of the claim is appended to the notice when it is recorded.

IDEM—CHANGING NAMES OF LOCATORS AFTER NOTICE HAS BEEN RECORDED.—Where the original notice of location was recorded, and afterwards changed by the erasure of one of the names of the locators and the insertion of another: *Held*, that the notice and record, as so changed, as to outsiders, was valid.

IDEM—CHANGING COURSE OF VEIN AFTER NOTICE IS RECORDED.—The notice as recorded was afterwards changed by striking out "westerly" and "easterly", as to the course of the vein, and inserting the words "northerly" and "southerly:" *Held*, the alteration having been made without any fraudulent intent, that the change was immaterial and did not vitiate the notice.

IDEM—ABANDONMENT—ESTOPPEL.—*Held*, that the changes as made in the notice of location after record did not show any intention on the part of the locators of the Paymaster mine to abandon it, and that the facts of this case do not present any question of estoppel.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts are stated in the opinion.

Thomas Wren, H. K. Mitchell, Crittenden Thornton, and Garber & Thornton, for Appellant.

There can be no valid location of a claim on a mineral lode since the passage of the act of May 10, 1872, without marking the boundaries of the surface ground. (Sec. 2320 Rev. Stat. U. S. (sec. 2 of act of May 10, 1872); sec. 2324 Rev. Stat. U. S. (sec. 5 of act of May 10, 1872.)) These provisions clearly intend and determine that the location shall be of the surface ground, of a tract of land, including a portion of a lode, or portions of more than one lode, and prescribe positively how such location shall be made. The commissioners of the general land-office department of the interior, have invariably so construed the law. The courts in similar cases have given considerable weight to such

Argument for Appellant.

actions of the land department. (Cooley's Const. Lim. 69; *Edwards, lessee v. Darby*, 12 Wheat. 210; *Surgell v. Lapice*, 8 How. 68; *Britton v. Ferry*, 14 Mich. 66.)

Prior to the act of July 26, 1866, and under that act the universal custom of miners was to locate so many feet of the lode, and the surface, allowed for convenient working, followed the portion of the lode claimed by operation of law. It is the general understanding of miners that by the act of May 10, 1872, this manner of locating lode claims was changed; and since the passage of this act what is considered as the mode provided by it, viz., locating a piece or parcel of the surface-ground, with boundaries distinctly marked to embrace all lodes, the top of or apex of which lies inside of the surface lines, has been adopted. This court can properly take cognizance of this condition of things. (*Irwin v. Phillips*, 5 Cal. 146; *Smith's Com. Stat. and Const. Law*, 740, 742.)

The legislature of Colorado recognized this mode of locating mining claims upon lodes. (Law of May 10, 1872; *Morrison's Mining Rights in Colorado*, 16.) In other states and territories the miners in the districts have generally passed laws repealing their former rules and regulations, and adopting the act of May 10, 1872 (with some additional provisions for the record of claims), and have complied with it by making the surface boundary and corners of the location. The marking of the boundaries of the surface claims is essential to the location of the ledge under the mining act of May 10, 1872. (*Golden Fleece G. and S. M. Co. v. Cable Con. G. and S. M. Co.*, 12 Nev. 318.)

The locator of a mining claim cannot, at his will claim the lode and relinquish any right or claim to any surface and all adjacent lodes, because, under the system provided by the act of congress, the lode, without surface, and the surface without all the lodes contained in it, will not be granted to him as a locator, nor sold or patented to him. Such is the mandate of the law. To obtain the part of the lode he wants, the locator must take such surface and other parts of the lodes as the law requires him to take. He can only take any portion of a lode by taking the sur-

Argument for Respondents.

face embracing its top or apex. He must take the gift of the government as it is given to him. If he does not comply with the laws his location is void, and must yield to one who takes according to the laws. (*English v. Johnson*, 17 Cal. 107.) When mining laws point out how mining claims must be located, they must be strictly complied with. (*Mallett v. Uncle Sam*, 1 Nev. 203.)

Such an attempted location, of the lode merely, would not only contravene the direct and positive requirements of the law as to the manner of making locations, but would contravene its general principles and policy. It would defeat the sale of the mineral lands, and overthrow the system established for that purpose. It would undo the provisions of the act of 1872, and place locations back as they were before the passage of that act. The location and the grant to the locator are no longer of so many feet of and along the lode, but of so much surface ground, with distinctly marked lines, and *thereby and therewith* of certain portions of all lodes having their top or apex therein.

H. K. Mitchell, of counsel for Appellant, argued:

I. That the Paymaster claim, as located in July, and the Shark, as located in September, 1872, did not conflict or interfere with each other.

II. That the Paymaster claim, as located in July, 1872, was, by the subsequent acts of defendant in October, 1872, abandoned and lost.

III. That the location of the Shark was a valid location under the act of congress and the laws of the district, as against the defendant.

IV. That the acts of defendant's grantors done in October, 1872, did not constitute a location either under the act of congress or the laws of the district, or create in them any right or privilege in the property in dispute, but operated as a direct fraud upon the plaintiff.

A. M. Hillhouse, for Respondents.

I: The appeal from the order overruling the motion for a new trial should not entitle appellant to question the cor-

Argument for Respondents.

rectness of the judgment, where no material objections are made to the findings. No statement on appeal is filed; except so far as by law, the statement on motion for a new trial is made the statement on appeal. In this appeal, the findings of fact, except those found by the court, are not complained of. The only error in law occurring at the trial alleged, is in relation to the admission in evidence of the Paymaster notice.

II. The plaintiff utterly failed to make out a case. She proved that the defendant had made application for a United States patent for the premises in dispute, but failed entirely to make any proof of the filing of a protest against that proceeding, on this ground. The action is brought under a special statute, is not a common law action, but is a special proceeding, instituted under the terms of the statute, to determine conflicting claims to mining ground. In such an action it must be averred "that a conflict exists."

III. The record of the notice of the location of the "Shark" is void, because it does not fix the *locus* of the claim by reference to natural objects or permanent monuments. The notice calls for no course, and does not state how the ground or vein is claimed. The only natural or artificial object it refers to is the "Paymaster," which is now claimed to have no existence.

IV. The "Shark" locators never discovered any vein, and never made any valid location. The main thing granted by the United States being the vein, of course no mere incident such as surface ground, or other veins, could or can be acquired without the essential prerequisite, a vein or lode.

V. The "Paymaster" notice and record are valid, and its boundaries are sufficiently marked. (See Copp's Land Owner, April 1, 1875, vol. 2, p. 2.) When the vein "is found," and also found to be a distinct, appreciable, tangible, natural object, projecting several feet above the earth's surface, and is sought to be appropriated, and a declaration or notice of that appropriation is placed upon that object, and that notice declares in terms that "this ledge" is sought to be appropriated; that that appropriation runs along the

Argument for Respondents.

course of "this ledge," so many feet in one direction and so many in another; surely, the evidence of intention to appropriate and identify the objects sought to be appropriated, could not be more clearly expressed. Such description of the thing, body or object sought to be appropriated can also be strengthened in its claim to validity by analogy. In the construction of deeds, patents and grants, courts have invariably held that boundaries described by course and distance should yield to calls which referred to natural objects. (*Holmes v. Trout*, 7 Pet. 217; *McIver, lessee, v. Walker*, 9 Cranch, 173.) The object of marking boundaries to a mining claim is to render locations certain, and to put subsequent comers upon notice. The marking of the course of the vein and location must clearly show that the vein is located; and if the locator claims no surface, or is willing to accept the lesser amount allowed by law, no one can complain. The boundaries of such a location can most certainly be traced very readily. The "Paymaster" vein cropped boldly. The notice was placed upon these crop-pings, and within a reasonable time, stakes were placed at each end of the claim, on its *true* course.

VI. There was no abandonment of the "Paymaster." (*Richardson v. McNulty*, 24 Cal. 345; *Morrison v. Wilson*, 13 Id. 499.)

VII. The change in the "Paymaster" notice and record are immaterial. When the location was completed, and the notice was posted and recorded, that created an inchoate title, or vested interest; which could only be destroyed by some of the modes prescribed by law. There was no abandonment. There was no sale, no gift, no transfer or forfeiture. (24 Cal. 345.)

VIII. Independent of the calls in a notice for a course of a location, different from the true course of the vein, or the marking of boundaries, the discoverer and locator of a vein or lode, is entitled to it to its full length, on its true course, and on its dip, indefinitely, into the ground, at right angles to its course. The act of congress gives the right to locate the vein discovered. That is the thing granted. With the vein follows, as an incident, the surface ground. This sur-

Argument for Respondents.

face ground lies in equal portions on each side of the imaginary line drawn through the middle of the vein lengthwise. The width of the surface ground on each side of the imaginary line may be from twenty-five to three hundred feet, as the law of the district may prescribe.

Prior to the legislation of congress, the miners of the several districts made their own laws, and the courts in construing those laws, have invariably given them such a reasonable construction as to enable the first locators to follow their vein along its course. This was done: first on account of the uncertainties surrounding the parties in new districts or regions, and the great difficulty that will nearly always at first occur in determining the exact course of the vein. Second, because the interest is always, and the notice almost invariably calls for the ground on the course of the vein which being a natural object, controls courses. All these reasons still exist. No legislation has been made which changes the situation as a matter of fact, or the rules of law governing courts in giving proper construction to the description in the notice of location. To require that the exact line or course of the vein must be ascertained, before a location is made, is to require, as is well known to all who know anything about veins and lodes, an impossibility in almost, if not quite all, cases in an undeveloped country.

In all patents issued by the government of the United States it will be noticed, that in each patent, the grant is absolutely to the vein patented. The land is also granted, and other veins, and the right to these other veins is limited upon their dip, to plans drawn downward through the end-lines. The act of congress should receive the same construction. (Secs. 2320, 2322 Rev. Stat. U. S.; Copp's Mining Decisions, 61, Dec: 26, 1872; Id. 154, May 20, 1875; Aug. 17, 1874; 1 Copp Land Owner, 83; Weeks' Commentaries, 150.

The marking of the course of the vein, so that it can "be easily seen," is a sufficient compliance with the act of congress; at least, until patent issues, or is applied for. Even if it would not give a locator all the surface permitted to be located under local rules, it would certainly carry the lowest amount allowed under the laws of the United States.

R. P. & H. N. Clement, of counsel for Respondent, also commented upon the various provisions of the statute of 1872.

I. Upon the rules of statutory construction they argued that the end aimed at—the “polar star” of all statutory construction—must be to ascertain the intention of the legislature. In trying to ascertain the intention of the law-makers, the reason of a statute, the motives which led to its passage, the object in contemplation at the time it was passed, must all be considered. (Sedgwick on Stat. Const. [2 ed.] 194; *Palache v. Pacific Ins. Co.*, 42 Cal. 430; *Bosely v. Mattingly*, 14 B. Monroe, 89; *Johnson v. Bush*, 3 Barb. Ch. 207, 238; *Young v. Dake*, 1 Selden, 463; *People v. Ithica Insurance Co.*, 15 Johns. 358, 380.)

II. Statutes *in pari materia* are to be taken together, as if they were one law. (*Eurl of Ailesbury v. Pattison*, 1 Doug. 30; Sedgwick on Stat. Const. [2 ed.] 209; Smith on Stat. Const. 622; *Manuel v. Manuel*, 13 Ohio St. 458; *Coffin v. Rich*, 45 Maine, 507; *Harrell v. Harrell*, 8 Florida, 46; *Perkins v. Perkins*, 62 Barb. 531; *Burwell v. Tullis*, 12 Minnesota, 572; *State of Ind. v. Springfield Tp.*, 6 Indiana, 83; Rule 10 of Leiber’s Hermeneutics; Sedgwick on Stat. Const. 247; Rule 6 of Leiber; Smith’s Const. of Stat. 612.) To invoke the doctrine of estoppel against the respondent in this case, the appellant must show that she has been misled—that it would be a fraud on her not to let her have the Paymaster vein. (*Marquart v. Bradford*, 43 Cal. 529; *Martin v. Zellerbach*, 38 Id. 300; *Davis v. Davis*, 26 Id. 23.)

By the Court, BEATTY J.:

This is an action to determine the right of possession of certain mining ground in the Ward district, White Pine county. The plaintiff derails title from the locators of a claim called the Shark, and the defendant is the grantee of the locators of the Paymaster. Both claims were located on the same ledge—the Paymaster in July, the Shark in September—and the principal question in the case is as to the validity of the Paymaster location. The facts in regard to

Opinion of the Court—Beatty, J.

this location are very clearly and fully presented by the findings of the district judge, which embrace the special verdict of a jury upon a number of issues submitted to its decision. No exception whatever is taken by either party to the findings of the jury, and the objections of the appellant to the additional findings of the court relate rather to the conclusions of law involved than to the facts upon which they are based. The question before us is therefore narrowed down to a construction of the legislation of congress and the local rules of the Ward district governing the location of mining claims.

Before entering upon a discussion of the purely legal questions involved in the case, however, it will be best to give a connected statement of the facts, which are as follows: Mineral deposits were first discovered in what is now the Ward mining district, by Thomas F. Ward, in March, 1872. On the first of May the district was organized, a set of local rules adopted, and (it seems) Ward appointed recorder. The rules so first adopted were, in their general features, like the rules everywhere prevalent on this coast before the enactment of the law of congress of May 10, 1872. Claims were to be located by posting a notice at the point of discovery; the notice to be recorded in fifteen days; this to hold the claim good for one hundred days, within which time a certain amount of work was to be done on the ground in order to hold the claim a year. Each locator was to have fifty feet of the surface on each side of his ledge or vein, but this not to carry the right to any mineral deposit therein distinct from the one located. These rules, so far as they were not inconsistent with the act of congress of May 10, 1872, continued in force until the first of October following, when the miners adopted a new set of rules.

Such being the law of the district for the location and holding of claims, Ward, on the seventeenth of July, 1872, discovered the vein or ledge which is now in controversy, and placed upon the croppings at the discovery-point the following notice:

“Paymaster location notice.—We, the undersigned, do hereby locate and claim fifteen hundred (1500) feet on this

Opinion of the Court—Beatty, J.

ledge, lode, or deposit of mineral bearing quartz or rock, with all its dips, spurs, angles and variations, together with all privileges prescribed by the mining laws of the United States and this district, and intend to hold and work the same according. We claim three hundred (300) feet easterly, and twelve hundred (1200) feet westerly from this monument, running along the course of the vein. This shall be known as the Paymaster. Ward mining district, July 17, 1872, situated about fifteen hundred feet N. W. by N., from Mountain Pride lode."

To this notice were appended the names of the locators, and opposite the name of each was set the number of feet (undivided) to which he was to be entitled.

On the following day, July 18, the claim was recorded by Ward, as mining recorder of the district, by copying it into a small memorandum-book which he carried in his pocket, and which at that time constituted the record-book of the district. Subsequently, about the first of August, a larger book was obtained, and the records transcribed from the little book. In the meantime, however, the Paymaster notice, and the record of it, had been changed as follows: It seems that there was some sort of an agreement subsisting between Ward, John Henry, E. C. Hardy and three others, that they should be equally interested in the locations made by Ward. But in the location of the Paymaster, Ward had omitted Hardy's name, and inserted that of Dave Pearson, who was not a member of the company. A few days after the location and recording of the claim, Henry called Ward's attention to the fact that Pearson's name was improperly on the notice, and Hardy's name improperly omitted. He also objected to the unequal distribution of the claim among the six locators. Ward thereupon changed the notice on the ground, and the record in the little book, by erasing the name of Pearson and substituting the name of Hardy, and by changing the figures following the names, so as to give to each locator two hundred and fifty feet of the claim. These changes in the notice and in the little book were made before the transcription to the large book which, since the first of August, 1872, has contained the records of the ward district.

Opinion of the Court—Beatty, J.

Subsequent developments have shown that the vein or ledge upon which this Paymaster claim was located has a course or strike from south-east to north-west. According to the magnetic meridian (variation $16\frac{1}{2}^{\circ}$) it runs more nearly east and west.

In September, 1872, some work, it does not appear how much, had been done on the Paymaster location, but the course of the vein was not clearly determined.

Such being the condition of that claim, on the ninth of September the locators of the Shark discovered the crop-pings of the same vein at a point about four hundred feet north-west of the location point of the Paymaster, and posted the following notice:

Shark mine No. 1. Notice. We, the undersigned, do hereby locate and claim fifteen hundred (1,500) feet on this ledge, lode or deposit of mineral-bearing quartz and rock, with all its dips, spurs, angles and variations, together with all privileges prescribed by the mining laws of the United States and this district, and intend to hold and work the same accordingly. We claim seven hundred and fifty feet on each side of the monument running along the course of the vein. This shall be known as the Shark mine No. 1.

“Ward Mining District, Nye County, Nevada, September 9, 1872.

“JOHN TAYLOR, three hundred and seventy-five feet.

“THOMAS CONNOR, three hundred and seventy-five feet.

“MATHEW GLEESON, three hundred and seventy-five feet.

“CHAS. STRUTENBERGER, three hundred and seventy-five feet.”

On the following day this notice was recorded, the certificate to the record being as follows:

“Recorded September 10, 1872, at ten o'clock A. M. Situated about six hundred feet north-easterly from Young American mine, and about three hundred feet north-westerly from Paymaster mine.

“THOMAS F. WARD, Recorder.”

Some significance is attributed to the fact that Ward, the locator of the Paymaster, going upon the ground for the purpose of making this record, and necessarily observing

the proximity of the Shark to the Paymaster, made no complaint at the time that the Shark locators were on his claim. It was not until October, and after some work had been done by the locators of the Shark, that notice was given that they were on the Paymaster vein. They, however denied that it was the same vein. They claimed a cross vein, and declared that if it turned out that they were on the Paymaster they would give it up.

About this time, on October 10, 1872, John Henry, one of the Paymaster locators, took down their notice and put up another, the same in all respects as the one removed except that it claimed three hundred feet southerly and one thousand two hundred feet northerly from the monument, instead of three hundred feet easterly and one thousand two hundred feet westerly. On the same day he drove down two stakes, one at the north-west end of the Paymaster and the other at the south-east end. They were marked "North-westerly stake of Paymaster" and "South-easterly stake of Paymaster." These stakes were on a line, or very nearly on a line, with the croppings of the vein as now developed, and within a few feet of the center-line of the claim as now surveyed. At some time subsequent to the change of the notice on the mine, a corresponding change was made in the record of the claim by erasing the words easterly and westerly, and inserting the words southerly and northerly. The jury could not find who made this change in the record, but the district judge was of the opinion, and so are we, that it was done by Ward and Henry, but without any fraudulent intent.

In the meantime, on the first of October, the laws of the district had been changed so as to conform more nearly to the act of congress of May 10, 1872, it being especially provided that locators should have three hundred feet of surface ground on each side of their vein, to include, of course, not only the vein originally located, but all veins within the surface lines. (R. S. sec. 2322.)

It is found as a fact that sufficient work has been done under each of these locations to satisfy the requirements of the law of congress and the rules of the district. The Pay-

master location was never marked upon the ground in any other way than by the three stakes on the line of the crop-pings, one at each end and one at the point of discovery, until it was surveyed for the purpose of the patent application in October, 1875. The Shark location was never marked on the ground in any way, except by the monument at its initial point, until April, 1874, when Gleeson set stakes at the four corners of the surface claim. On these facts the district judge concluded that the Paymaster location was valid, and, as a necessary consequence, the subsequent location of the Shark on the same ground was invalid. In accordance with this conclusion the judgment of the district court was for the defendant.

The plaintiff, appealing from the judgment and from the order denying her motion for a new trial, makes a number of assignments of error, which, however, are all involved in the three propositions following.

It is contended: 1. That the Paymaster claim was not located in conformity with the act of congress and the rules of the district, and consequently that it was void; 2. That the Paymaster locators, if they ever had a good claim, abandoned it; 3. That they are estopped by their own acts from asserting any claim adverse to the Shark.

Keeping these propositions entirely distinct, and confining our attention for the present to the first, it is to be observed that there is no question that the locators of the Paymaster were the original discoverers of the ledge in controversy; that they made a *bona fide* attempt to locate it; that their claim was notorious; that they and their successors have continued to occupy and develop the property; that the Shark locators were aware of the priority of the Paymaster claim, and originally repudiated any intention of locating upon the same vein. These facts being conceded, the only position open to the appellant, and the only position her counsel have attempted to maintain, is that a mining claim cannot be held except by compliance with certain requirements of the mining laws; that the Paymaster locators did not conform to those requirements, while the locators of the Shark did, and that, as a

necessary consequence, the law gives her the property. Aside from the questions of abandonment and estoppel, she claims nothing except from a strict application of the law, regardless of any seeming hardship in depriving the defendant of a mine which its predecessors were the first to discover, claim and develop.

There can be no doubt as to the correctness of the proposition upon which this claim is founded. The United States have granted to their citizens, and to those who have declared their intention to become such, the right to explore and occupy the public mineral lands. (U. S. Revised Statutes, sec. 2319.) Those qualified locators who comply with the laws of the United States, and the local regulations not in conflict therewith, governing their possessory title, have the *exclusive* right of possession and enjoyment of their locations. (R. S. 2322.) He who complies with the law has the *exclusive* right. Therefore, if it is true that the Shark locators complied and those of the Paymaster did not, the plaintiff must take the mine, no matter who is entitled to the credit of the discovery.

What then constitutes compliance? The questions involved in this branch of the case have led to a very thorough and elaborate discussion of the mining laws of the United States, and particularly of the act of congress of May 10, 1872 (R. S. sec. 2319 *et seq.*), under which these claims were located, and which embodies the most important features of the mining legislation. The same questions were, to some extent, involved in the case of the *Golden Fleece Company v. Cable Consolidated Company* (12 Nev. 312), but were not very fully argued, and were discussed in the opinion only so far as seemed to be necessary for the disposition of that case. Some of the conclusions then announced have been questioned by counsel for respondent in this appeal, but after a thorough re-examination of the whole subject, with all the light that has been thrown upon it by the most elaborate argument, oral and written, we remain entirely satisfied with that opinion. So far as it goes, it is a correct exposition of our present understanding of the law. But it does not cover the whole ground, and is, perhaps,

Opinion of the Court—Beatty, J.

not sufficiently explicit upon some of the points adverted to. The magnitude of this case and the great importance of the subject to a mining community warrant a re-statement of our views in a more complete and, we hope, a more convincing form.

One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is that it shall be "distinctly marked on the ground so that its boundaries can be readily traced" (R. S. 2324). By reference to the foregoing statement of facts it will be seen that one of the locators of the Shark in April, 1874, marked the boundaries of that location by setting stakes at the four corners of the claim. It is conceded that this was a sufficient marking of that location; but it is contended that the Paymaster had been sufficiently marked since October 10, 1872, by means of the two stakes at the ends of the claim on the line of the croppings and by the location monument at the point of discovery. Whether this marking was sufficient to answer the requirements of the statute is the principal question in the case, and, as a step towards its solution, counsel have devoted a great portion of their argument to the preliminary question: What does a mining claim consist of? what are its essentials? What are its incidents? Is it the surface ground that is located, or is it the vein with the surface as an incident? It is conceived that a determination of this point will greatly facilitate the inquiry as to what sort of marking of boundaries is required. Counsel for appellant contend that the location is of the surface and that stakes at the corners of the claim are essential. Counsel for respondent insist that the location is of the vein as the principal thing with the surface as a mere incident, and that stakes to define the limits of the claim upon the vein are sufficient.

What we said in the *Golden Fleece* case we think expresses the truth in regard to this matter: "It is true that the vein is the principal thing and that the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings, or point at which the vein

is exposed, and the part of the vein located is determined by reference to the lines of the surface claim." (12 Nev. 329.)

The vein is the principal thing in the sense that it is for the sake of the vein that the location is made; the surface is of no value without it; no location can be made until a vein has been discovered within its limits, and the surface must, or at least ought to, be located in conformity with the course of the vein. (R. S. 2320.) But the location is of a piece of land including the vein.

"A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, renders such limitation necessary. The end lines of each claim shall be parallel to each other." (R. S. 2320.) This section alone shows that it is a surface parallelogram not less than fifty feet in width that must be located. But the purpose of the law is more clearly indicated by its granting clauses. What is it that the locators have the exclusive right to possess? Having complied with the laws they "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations." (R. S. 2322.) This is the only part of the act which grants the right to possess any lode, ledge or vein. The vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral de-

posits that may happen to exist within the limits of the surface claim, and no part of it is granted except that part the top or apex of which lies inside of the surface lines extended downward vertically. This, it would seem, ought to be conclusive, but the language of section 2325 is, if possible, still more convincing: "Section 2325. A patent for *any land* claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located *a piece of land* for such purposes," may, by taking the prescribed steps, obtain the title upon payment of five dollars per acre for the land.

Thus it appears that a location on a vein must be made by taking up "*a piece of land*" to include it. No other means are provided, and it is only upon condition of complying with the law that the locator becomes entitled to anything. The discoverer of a vein may be allowed a reasonable time to trace its course before being compelled to define his surface claim, and in the meantime may be protected in his claim to fifteen hundred feet of the vein, but his location will never be complete until his surface claim is defined. That this is the only possible construction of the statute seems so plain to our minds that we should have thought it superfluous to say a word in defense of our view if we were not aware that an opposite opinion is very largely prevalent. We think this is due to the fact that the custom of locating a vein claim by means of a notice posted on the croppings, and of holding it by record of the notice and work done at the discovery point, without any definition of boundaries, has prevailed so long and so universally on the Pacific Coast that the system has come to be regarded by a great many as something essentially inherent in the nature of things. The right, under such locations, to follow the vein in whatever direction it might run, to the extent claimed in the location notice, taking the adjacent surface necessary for the convenient working of the mine as a mere incident thereto, has been so long recognized and enjoyed as to have almost assumed the character of one of the natural and inalienable rights of man. That the government,

in disposing of its mineral lands, has adopted a radically different system, under which a vein can only be located by means of a surface claim, and held only to the extent that it is included within the surface lines, is a thing too incredible to be believed by those to whom the old customs seemed rooted in the very foundations of justice.

But disagreeable as the awakening may be, it is time we were opening our eyes to the fact that a new system has been introduced. The act of congress of May 10, 1872, has effected the changes above indicated. Its language is plain and unambiguous, and whatever may be our opinion of the impolicy of the changes effected by it, we are bound to submit and conform ourselves to its requirements. If the terms of the statute left any room for construction the *argumentum ab inconvenienti* might be entitled to great weight, but it cannot be invoked where the language of the law is so plain as it is in this instance.

Besides, we do not share in the opinion that the new system is so utterly bad. Nobody can pretend that it is perfect, but to our minds it is a great improvement on the system which it displaced. We are willing to admit that cases may arise to which it will be difficult to apply the law, but this only proves that such cases escaped the foresight of congress, or that, although they foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt. So far, the wisdom of the congressional plan has been sufficiently vindicated by experience. It is true that veins and ledges are not found to be perfectly regular in their formation—they have not a perfectly straight course even in depth, and near the surface they present still greater irregularities of strike and dip; but still they approximate the ideal vein that congress seems to have had in view sufficiently nearly to admit of an easy application of the law in all the cases of conflicting claims that have fallen under our observation.

As to the difficulty of establishing surface lines immediately upon the discovery of a vein, that also is conceded.

Opinion of the Court—Beatty, J.

It is a well-known fact that the croppings of a vein are always a very imperfect, and often a very deceptive, guide to its course, and it will often be difficult, and sometimes impossible, to locate a surface claim in conformity with the course of the vein, even after years spent in its development.

But all this affords no argument against the system. Unless the miners voluntarily restrict themselves by local regulations, a claim may always be one thousand five hundred feet long by six hundred feet wide. Let the discoverer of a vein be ever so unfortunate in locating his claim, he cannot possibly get less than six hundred feet of the vein, while under the old law the most he could get was four hundred feet. How, then, can it be said that he is subjected to any hardships? So far from restricting his rights, the new law has very greatly enlarged them, and at the same time has made them vastly more certain and secure.

Furthermore, we do not understand that the law requires the surface claim to be defined immediately upon the discovery of the vein. We think that under any circumstances the discoverer, if he went to work diligently to trace out its course, would be allowed a reasonable time for that purpose, and in the meantime would be protected in his right to one thousand five hundred feet of the vein. In the absence of any state or territorial or local regulation prescribing the time to be allowed for tracing, the question as to what should be deemed a reasonable time would have to be determined in view of the facts and circumstances of each case. We said, however, in the *Golden Fleece* case (12 Nev. 329), and we still think, that this is a matter for local regulation under the power delegated to the miners by section 2324 of the revised statutes, to make rules not in conflict with the laws. Any reasonable rule for the provisional holding of a claim, by means of the posting and recording of notice, during the time necessary for tracing, would, we feel confident, be favorably viewed by the courts, especially if it required the locator to use diligence in the work of tracing during the time allowed for that purpose. This, however, is a question which we are not called upon to de-

Opinion of the Court—Beatty, J.

cide in this case. We have been led into this line of argument in response to what has been said by counsel for respondent in regard to the great hardship imposed upon the discoverer of a vein by compelling him to define his surface claim before he could possibly ascertain the course of the vein. If we are right in our opinion that he would be allowed a reasonable time for tracing, the supposed hardship does not exist. If we are wrong, and if the discoverer must set his stakes without stopping to trace the vein, even then, as we have shown, he is better off since, than he was before, the statute. His surface lines will necessarily include at least six hundred feet of the vein, and may include upwards of one thousand six hundred. In the latter case he may be compelled to readjust his lines so as to take only one thousand five hundred feet, but in any case he can secure six hundred feet. Before the statute he could claim no more than four hundred feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and in order to enjoin them from stealing his property, was obliged to trace the vein between them and the location point. He was harassed with litigation, and his means often entirely consumed in the prosecution of work not necessary for the development of his mine, but essential for the vindication of his title. Under the new law this source of vexation and expense is entirely swept away. Within his surface lines the discoverer of a vein is secure, and he might well consent to sacrifice something in the extent of his claim for the sake of that security. So far, however, from having to make such a sacrifice, his claim, at the very worst, is more ample than it ever was before. Sound policy, therefore, concurs with the language of the statute in sustaining our conclusion that a vein can only be located by means of a surface claim. How soon after the discovery of the vein "the location must be distinctly marked on the ground so that its boundaries can be readily traced" (R. S. 2324), we do not decide, but until it is so marked we are clear that the location is not complete, and the law has not been complied with.

So far we agree entirely with the views of counsel for

Opinion of the Court—Beatty, J.

appellant; but, although we are satisfied that a location must be of a surface claim, and that the boundaries and extent of the claim must be plainly defined by stakes or marks on the ground, it does not appear to be a necessary consequence that the least admissible marking is by posts or monuments at all the corners of the claim.

We are aware that the commissioner of the land-office has recommended the planting of posts at the corners and the erection of a sign-board with the name of the claim, the names of the locators, etc., at the location point, and undoubtedly a compliance with these recommendations would be sufficient to satisfy the law in this particular. But at the same time we think it may be satisfied by something less. There is, after all, something in the fact that it is a mining claim and not an agricultural claim that is being located, and some account should be taken of the customs, habits and circumstances of a mining community in determining what is a sufficient marking of a mining claim. The vein is always the principal object that the locator has in view; it is generally, after location and work at the location point, a conspicuous feature of the locality; it is the first thing that attracts the attention of mining men; the surface claim by which it is to be located ought to conform to its course; the end lines must be parallel, and, as they ought to conform to the dip of the ledge as nearly as practicable, they ought to be at right angles to the side lines, so that if the center-line of the claim is once established the boundaries are thereby fixed and may be readily traced.

The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. We concede that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But it must be remembered that the law does not in express

Opinion of the Court—Beatty, J.

terms require the *boundaries* to be marked. It requires the *location* to be so marked that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries; they are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the marking of a center-line in a district where the extent of a claim on each side of the center-line is established by the local rules? It would be safer and therefore better to comply with the recommendations of the land-office and erect stakes at the corners of the claim, but if the grand object of the law is attained by the marking of a center-line we can see no reason why it should not be allowed to be sufficient.

In this case the locators of the Paymaster marked the center-line of their claim on the tenth of October, 1872. No miner, no man of common intelligence acquainted with the customs of the country, could have gone on the ground and seen the monument, notice and work at the discovery point and the two stakes, one three hundred feet south-east of the location monument, marked "South-easterly stake of Paymaster," the other twelve hundred feet north-west of the location monument and marked "North-westerly stake of Paymaster," in a line with the croppings and with the discovery point, without seeing at a glance that they marked the center-line of the claim. By the rules of the district and the laws of the land he would have been informed that the boundaries of the claim were formed by lines parallel to the center-line and three hundred feet distant therefrom and by end-lines at right angles thereto. With this knowledge he could easily have traced the boundaries and, if such was his wish, ascertained exactly where he could locate with safety. We conclude, therefore, that the Paymaster location was sufficiently marked on October 10, 1872. At that time the Shark location had not been marked in any way, and whether the law allows a locator a reasonable time or not to mark his boundaries, protecting his full claim in the meanwhile, the same result equally follows. If the Paymaster was not marked within a reasonable time after the discovery, then certainly the Shark was not, for the first was

Opinion of the Court—Beatty, J.

marked within three months and the latter not until more than eighteen months after discovery; so that the Shark claim was lost by the failure to mark its location within a reasonable time. If on the other hand, the Paymaster location was marked in a reasonable time, and such time is allowed, then the Shark was thereby excluded. If no time for tracing is allowed, and the first to mark his boundaries is first in right, then the Paymaster location holds the claim, because it was first defined by monuments on the ground. Unless the Paymaster locators failed in some other particular to comply with the law, there is no hypothesis upon which anything can be claimed under the Shark location. But it is contended that the Paymaster location was rendered invalid by non-compliance with the rules of the district and the law of congress respecting the notice and record of claims. There is no doubt that in order to secure the right of possession to a mining claim there must be a compliance not only with the laws of the United States, but also with such local regulations of the mining districts as are not in conflict therewith (R. S. 2324), and if the miners of the Ward district have made the posting and recording of location notices essential, the courts are not at liberty to dispense with them.

The original laws of the district were adopted May 1, 1872, ten days prior to the passage of the act of congress, which, as we have seen, introduced an entirely new system of making locations, a system in which the preliminary posting and recording of notices is entirely out of place, except, as a means of protecting a claim during the time necessary for tracing the ledge and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete. In place of a very imperfect, and often misleading, notice of what was claimed, there is a plain and unambiguous notice to all the world of the exact position and extent of the location. It might well have been held, therefore, with respect to the rules adopted May 1, 1872, that their requirements as to the posting and recording of

notices were superseded by the act of congress of May 10, 1872: that they were merged in the higher and more efficacious rule of the statute, or, at least that, if they continued of any force whatever, it was only as a means of protecting a vein discovery during the time reasonably necessary for tracing its course and marking the boundaries of the location, and, consequently, that if the discoverer chose to mark his location in the beginning, or actually did so at any time before an adverse claim was made, his failure to post and record a notice would count for nothing.

But the rules of the district were revised on the first of October, after the passage of the act of congress, and the provisions with respect to the notice and record of claims were re-adopted without any additional provision for bringing them into sensible relation to the law. They do not purport to supply a means of holding a claim pending the marking of the location on the ground, but stand as substantive and independent requirements, a compliance with which is essential to the validity of a claim. We are not willing under the circumstances to go to the extent of holding that their observance can be dispensed with, even where a location has been plainly marked before the making of an adverse claim. We will assume that it was necessary for the locators of the Paymaster not only to have marked their location before the Shark locators complied with the law, but also to have posted and recorded a notice of the claim. Did they do so?

There can be no question that the original Paymaster notice was all that the law requires. The only objection to it is that it did not contain in itself a description of the claim by reference to some natural object or permanent monument. It was not necessary that it should. It is only the *record* of the claim that is required to contain such a description; and there are excellent reasons for making a distinction between the notice and record in this particular. A notice is generally, and for safety ought always to be, posted immediately upon the discovery of the vein, before there is any time to survey the ground and ascertain the bearings and distances of natural objects or permanent

Opinion of the Court—Beatty, J.

monuments in the neighborhood; and besides,* the claim referred to by the notice is always sufficiently identified by the fact that it is posted on, or in immediate proximity to, the croppings. A notice claiming a location on "this vein" has only one meaning. But the notice is exposed to the danger of removal by adverse claimants, or destruction by the elements, and for permanent evidence of the location its record is provided for. The record, if it consisted of a mere copy of the notice, would not identify the claim, and there would be an opportunity as well as a temptation to the locators, upon the discovery of a more valuable mine in the vicinity, to prove, by perjured witnesses, that their notice was posted on that mine. The floating of claims was by no means an infrequent occurrence prior to the act of 1872, and if such attempts were seldom completely successful, they were always vexatious, and often the means of levying a heavy black-mail. It was on this account that the *record* (not the notice) was required to contain "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim" (R. S. 2224). It is a sufficient compliance with this provision of the law if the description of the *locus* of the claim is appended to the notice when it is recorded. But by reference to the foregoing statement of facts it will be seen that not only did the record of the Paymaster location contain the necessary description; it was also contained in the body of the notice as posted on the ground: Situated about fifteen hundred feet N.W. by N. of the "Mountain Pride lode," is the description in the notice; and as no objection to it was made upon the ground that the "Mountain Pride lode" was not a well-known natural object, at that distance and in that direction from the Paymaster location monument, we presume it was, in fact, a good description. The record also contained the names of the locators and the date of the location, and thus fulfilled every requirement of the act of congress. (R. S. 2324.) But it was changed by Ward and Henry, and it is contended that after those changes it was no longer a good record.

The argument in support of this point is about as follows: Pearson, whose name was in the original notice, as first recorded in the little book, was one of the locators of the claim; he had a vested right, and could not be deprived of his interest by the erasure of his name from the notice and record, and consequently after his name was scratched out the record no longer contained the names of the locators, and was void. We do not think it is by any means clear that Pearson ever acquired any interest in the claim. It does not appear that he ever assented to the use of his name as a locator by Ward, who actually made the discovery and posted and recorded the notice, and it does appear that there was some sort of arrangement by which Ward was to divide his discoveries equally among those whose names were afterwards signed to the notice. If Pearson had no right to a share in the discovery, and if Ward merely inserted his name by mistake, or under some misapprehension, and erased it before the claim had been perfected by work or the marking of its boundaries, it is difficult to see upon what ground he could claim to have ever had any vested right as a locator. But whether he had or not is a question between him and the other locators of the Paymaster. As to outsiders, the notice and record were sufficient. They contained the names of those who claimed to be the locators, and served every purpose of the law—that is, they identified the claimants and the claim.

The subsequent alteration of the notice by changing the words westerly and easterly to northerly and southerly had no effect upon the rights of the parties. The only purpose of those words was to show in which direction from the discovery point the claim extended one thousand two hundred feet, and in which direction its extent was only three hundred feet. Either set of words served the purpose equally well. No doubt when the vein was first discovered its course seemed to be east and west; after a certain amount of development it seemed to run north and south, and the notice was changed for the perfectly innocent and even laudable purpose of giving to all whom it might concern a better description of the claim. The corresponding

Opinion of the Court—Beatty, J.

alteration in the record was made with the same motive, at least the court finds that it was done without any fraudulent intent; and certainly it was wholly immaterial. There was no swinging of the location effected by this change in the notice and record. The claim was never fixed until the stakes were set; and so far as the notice was concerned it claimed one thousand five hundred feet of the vein, no matter where it might run. If it was good for anything it was good for what it claimed pending the marking of the location. The changes and erasures in the record were certainly irregular, and if they had been material, or if they had not been satisfactorily explained, might have afforded good grounds for excluding it from evidence. But they were satisfactorily explained. They were not designed to defraud any one, and had no such effect. We think that the comments of the district judge on this matter are very just. "Mining recorders are a class of officials that must be treated with a great deal of forbearance and indulgence. They are often entirely ignorant of legal forms, and have no appreciation of the horror with which an ordinary lawyer views the erasure or alteration of records and other documents. Where no fraud or deception is intended, their blunders must not be construed into crimes."

This disposes of the first proposition of appellant. The second and third are entirely without merit, and as they relate to well settled doctrines of the law, they will be very briefly adverted to. There is not the slightest evidence of an intention on the part of the Paymaster locators to abandon their claim. The act of Henry in changing the language of the notice on the tenth of October, 1872, proves only that he had abandoned the opinion that the course of the ledge was east and west. So far from proving an intention to abandon a foot of his claim on the ledge, it proves exactly the reverse.

Nor do the facts present a single element of estoppel. Each party had exactly the same means of information. When the Shark location was made it was as much the business of its locators to know whether it was on the Paymaster vein as it was of Ward, the recorder. The truth proba-

Opinion of the Court—Beatty, J.

bly is that no one at that time thought the two claims would conflict. It is idle, therefore, to say that any culpable silence on the part of Ward caused the expenditure of labor and money on the Shark. If the locators of that claim were deceived it was their fault, and they must suffer the consequences.

As to the change in the Paymaster notice from east and west to north and south, that was, as we have seen, wholly immaterial. The simultaneous setting of the stakes entirely superseded the calls of the notice, and was the first thing that ever fixed the boundaries of the claim. If, after that, the Shark locators continued at work, they did so with their eyes wide open, as they did everything else from the beginning to the end of their attempts to locate the ground. From the outset they had the same opportunities to know the truth that the other party had. If they have any better claim to the property than the defendant, it is not because they were deceived or misled, but only because they can show a technical compliance with the law, while their adversaries cannot. It is upon this ground alone that their case has any semblance of strength, and upon this ground we think it clearly fails.

Since the foregoing was written two cases (*Gelsich v. Moriarty et al.*, and *Holland et al. v. Mount Auburn G. Q. M. Co.*) have been decided by the supreme court of California, in both of which it is assumed, as a point beyond question, that the marking of a mining location on the ground so that its boundaries can be readily traced is absolutely essential to the validity of the claim. This is in perfect accordance with our own views as above expressed. But in the latter of these cases it seems also to be held that the marking of the center line of the claim is not sufficient to satisfy the requirements of the law. The opinion of the court is very brief, and no reasons are assigned for the conclusions reached. We have, however, been led by that decision to thoroughly reconsider our own opinion on this point, and the arguments of counsel *pro* and *con*. The result is that we are satisfied of the correctness of our first conclusion.

Opinion of Hawley, C. J., concurring.

A mining claim consists of a certain breadth of surface, to be laid off on each side of the line of the croppings, with the mineral deposits included therein. The center line, as a matter of course, is to be a straight line conforming to the general strike of the vein as nearly as that can be ascertained. The side lines are to be parallel to the center line, and if, as we assume to be the proper construction of the law, the end lines must be parallel and conform to the dip of the vein, which is at right angles to its strike it follows, with the conclusiveness of a mathematical demonstration, that when the center line is once definitely fixed the boundary lines can be traced (that is, followed out) with absolute certainty. It may be that they could not be traced as easily and readily as if stakes were set at the corners, but the difference would be very slight and of no practical consequence. In any case we think that the law should receive as liberal and beneficial a construction as is consistent with the object which congress undoubtedly had in view in passing it. That object, we are satisfied, was not to save intending locators a slight amount of labor in tracing older claims, but it was to make the boundaries of such older claims certain and immovable; to put an end forever to the shifting and floating of claims; to do away with an existing and intolerable evil. The whole object of the law is accomplished whenever, from the monuments on the ground, the boundaries of a mining claim can be traced with absolute certainty and without any practical difficulty, and for that purpose a definitely fixed center line is sufficient.

The judgment and order appealed from ought to be affirmed, and it is so ordered.

HAWLEY, C. J., concurring:

I concur in the conclusions reached by the court that the judgment of the district court ought to be affirmed; but I am unwilling to give an unqualified approval of the construction given to the mining laws of the United States.

If I entertained the opinion, as expressed by the court, that "it is a surface parallelogram not less than fifty feet in width that must be located;" that the location on a vein

Opinion of Hawley, C. J., concurring.

"must be made by taking up a piece of land to include it;" that a vein "can only be located by means of a surface claim, and held only to the extent that it is included in the surface lines," and if—upon these points—I agreed "entirely with the views of counsel for appellant," I should be inclined to agree with their conclusions that it is the surface location that "must be distinctly marked on the ground so that its boundaries can be readily traced."

But I do not believe that it was the intention of congress, by the passage of the several acts referred to in the opinion of the court, to produce an entire revolution in the system of locating mining claims. Some very important changes have been made, and the rights of the locators have been enlarged and made more specific; but, in my judgment, it is—as it was under the old system—the vein of quartz, the lode that is the principal thing constituting the location. The surface ground is but an incident thereto. The location of such a mining claim is distinctly marked on the ground so that its boundaries can be readily traced," by the placing of stakes along the lode and at the ends of the location, or by such other monuments or marks as will clearly designate the number of feet in length and the particular lode located. In my judgment the location need not, necessarily, be the taking up of "a piece of land" in the form of a parallelogram. When the vein or lode is sufficiently identified and marked, as above stated, the laws of the local district fix the number of feet in width—of the surface ground—to which the locator is entitled. It being, of course, understood that: "No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

I differ with the court upon another point discussed in the opinion. I think that after the vein or lode is properly located the locator thereof has the right to fifteen hundred feet along the course of the lode, "in whatever direction it runs, irrespective of the vertical side lines of the surface boundaries" (Dissenting Opinion, *Golden Fleece v. Cable Con-*

Argument for Appellant.

solidated, 12 Nev. 331), and that he would only be entitled to fifteen hundred feet in length, although the vein took such a course as to embrace more than fifteen hundred feet within the end lines of his surface location.

[No. 891.]

MARIA ESTIS, RESPONDENT, v. SOL. SIMPSON,
APPELLANT.

PLEADINGS—KNOWLEDGE IMPARTED BY.—A party cannot be presumed to be apprised of any facts by the pleading of his adversary except those stated therein and such others as follow therefrom.

CONSIDERATION OF NOTE GIVEN BY AGENT—WHEN SUFFICIENT.—Where an agent receives money from his principal and loans it out upon mortgage taken in his own name, and afterwards, for the purpose of securing the principal for the loan, gives his own note, and as a defense to this note claims that it was given without consideration: *Held*, that if the agent had absolutely sold and assigned the mortgage to a third party and appropriated the money received thereby, to his own use, this would constitute a sufficient consideration to uphold the note as a cause of action, to the extent of the principal's proportion of the whole value of the mortgaged property.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion.

Boardman & Varian, for Appellant.

Upon a review of the facts, counsel claimed that: the court below had no legal right to grant a new trial; that it had abused its discretion and that its order ought to be reversed. (3 Graham and Waterman on New Trials, 874-77, 894-98, 962-64, 931-37, 1016-28, 1067-71; *Burr v. Palmer*, 23 Vt. 244; *Jackson v. Roe*, 9 John 77; *Cummins v. Walden*, 4 Blackf. 307; *Goins v. State*, 41 Tex. 334; *Martin v. Garver*, 40 Ind. 351; *Smith v. Williams*, 11 Kan. 104; *Heady v. Fishburn*, 3 Neb. 263; *Wallace v. Tumlin*, 42 Ga. 462; *Savoni v. Brashear*, 46 Mo. 345; *Ames v. Howard*, 1 Sumner, 482; *Palmer v. Fisk*, 2 Curtis C. C.

Opinion of the Court—Leonard, J.

14; *Brooks v. Douglass*, 32 Cal. 211; *Schellhous v. Bull*, 29 Id. 605; *Armstrong v. Davis*, 41 Id. 499; *Price v. Brown*, Strange, 691; *Cooke v. Berry*, 1 Wilson, 98; *Harrison v. Harrison*, 9 Price, 89; *Herman v. Mason*, 37 Wis. 273.)

Robert M. Clarke, for Respondent.

I. The judgment should have been for the plaintiff upon the pleadings and proofs. The taking of the note and mortgage in Ward's name was a conversion, and Simpson immediately became indebted in the whole amount.

II. The new evidence was material, and the order granting a new trial should be affirmed for that reason.

Thomas E. Hayden, also for Respondent.

A written instrument cannot be varied, altered, explained or amended, or other terms engrafted upon it by verbal agreements made contemporaneously with or before the execution of such instrument. (Greenl. on Ev. vol. 1 [Red. Ed.] § 275; Keats' Com. vol. 2, 731-32; Chitty on Cont. 105; Story on Notes, Lees, 291, 410; *Travis v. Epstein*, 1 Nev. 116; *Feusier v. Sneath*, 3 Nev. 125-28; 2 Pars. on Notes and Bills, 501-13; Id. 523.

By the Court, LEONARD, J.:

This is an action upon a negotiable promissory note for two thousand two hundred dollars, with interest at two per cent. per month, dated January 22, 1876, and by its terms due and payable August 10, 1876. Upon the note there is an indorsement in the handwriting of defendant, as follows: "Paid on the within note, six hundred dollars, July 22, 1876. Simpson." Defendant, both by his answer and at the trial, admitted the execution and delivery of the note to plaintiff, but denied that he paid thereon six hundred dollars or any other sum, or that there was anything due thereon. His defense is entire want of consideration. The allegations contained in the answer in support of this plea are in substance as follows: That on the twenty-second day of January, 1873, defendant was the duly constituted agent of plaintiff in Virginia city, in this state, and as such agent

Opinion of the Court—Leonard, J

had general supervision and control of all of plaintiff's financial affairs and general business, and full and complete management thereof in said city and state; that as such agent he had special authority to invest and loan, in his own name or otherwise, upon such terms and conditions as he should deem advisable, all moneys of plaintiff that should from time to time remain in his hands, as and for the special use and benefit of plaintiff; that on or about said day, he had in his hands, as such agent, the sum of one thousand five hundred and fifty dollars belonging to plaintiff; that he then deemed it advisable to loan, and did loan, said sum belonging to plaintiff, together with two hundred and fifty dollars of his own money, to one F. A. Cox, for the period of two years, at the rate of two per cent. per month interest, and received Cox's note and mortgage upon real property in Virginia city to secure the same; that after the expiration of two years, and while he was still plaintiff's agent as before stated, he deemed it advisable to renew, and did renew, said note and mortgage, for the term of one year thence next ensuing; that Cox had failed to pay any part of the amount due; that a decree foreclosing the mortgage had been entered in the first judicial district court in Storey county; that an order of sale had been made, and proceedings were pending to fully foreclose and satisfy said mortgage, all of which had been and was known to plaintiff; "that on the twenty-second day of January, 1876, for the purpose of securing the plaintiff against all and singular the acts of defendant in the premises, and that defendant should well and truly account to plaintiff for her proportion of the moneys that should be collected from the sale of the mortgaged property, or from Cox, and not otherwise, and while the foreclosure proceedings were pending, the defendant made and delivered the promissory note set out in the plaintiff's complaint;" that said note was and is wholly without consideration to defendant, and was not intended as evidence or acknowledgment of any debt due from defendant to plaintiff, all of which plaintiff well knew; that the six hundred dollars indorsed upon the note was advanced to plaintiff for the purpose of relieving her necessi-

ties, upon the understanding and agreement that the same sum should be retained by defendant from the moneys to be collected upon the note and mortgage; that such advance was not made as a payment or acknowledgment of indebtedness; that since the loan to Cox defendant had had no moneys of plaintiff in his hands or under his control.

This action was commenced September 27, 1876. It was tried by the court, without a jury, January 22, 1877, and the findings and judgment were substantially in accord with defendant's answer. Defendant had judgment for his costs. Plaintiff moved for a new trial on the following grounds: Accident and surprise; newly discovered evidence; insufficiency of evidence to justify the decision of the court, and errors in law occurring at the trial.

The court ordered a new trial, upon the grounds of accident and surprise, and newly discovered evidence.

Defendant appeals from the order. Defendant's counsel insist that the evidence given on the trial shows there was no sufficient consideration for the note in suit to sustain an action thereon; that the newly discovered evidence set out in the affidavit for a new trial could not change the result first arrived at by the decision of the court; that by the answer plaintiff was given full notice of the defense to the note as well as of the existence of the facts set up in the affidavit, and that, consequently, she should have produced at the trial the evidence now claimed to be newly discovered.

We do not think that either the answer or the evidence introduced at the trial, gave notice to plaintiff, or put her upon track, of many material facts stated in the affidavit as newly discovered evidence. Plaintiff had notice that defendant claimed the note to be void for want of consideration; that defendant as plaintiff's agent loaned the money about January 22, 1873, to Cox for two years, and in his own name received a note and mortgage for plaintiff's use and benefit; that at the expiration of two years he renewed the Cox note and mortgage for the period of one year; that a decree foreclosing said renewed mortgage had been entered in the proper court, and an order of sale made. Plaintiff

Opinion of the Court—Leonard, J.

was notified by defendant's testimony at the trial, that the property had been sold under the order of sale above mentioned, and that the time for redemption had expired. But the affidavit for a new trial shows, that on or about September 19, 1873, Cox executed and delivered to defendant the note and mortgage for the sum of one thousand five hundred and fifty dollars; that defendant assigned the same to O. W. Ward, February 10, 1875; that on April 13, 1875, Cox and wife executed to one Douglass notes and mortgages upon the same property for one thousand eight hundred and thirty-six dollars, in consideration of the satisfaction of the former note and mortgage given to defendant; that on the eighteenth day of September, 1875, the last notes and mortgage were assigned by Douglass to Ward; that on the fifteenth day of March, 1876, Ward, in consideration of one thousand eight hundred dollars, to him in hand paid by C. Derby, the receipt of which was duly acknowledged by Ward, sold and assigned said notes and mortgage absolutely to Derby, for his use and benefit; that on March 15, 1876, having power so to do, Derby brought suit of foreclosure in Ward's name, and on June 28, 1876, obtained decree and judgment for two thousand six hundred and eighty-three dollars with order of sale; that Derby caused the property to be sold; that he purchased it at sheriff's sale for the sum of two thousand eight hundred and fifty-three dollars, and on the twenty-fourth of January, 1877, received the sheriff's deed therefor, when he became, and now is, the absolute owner thereof.

Plaintiff was notified by the answer, that defendant renewed the first note and mortgage for one year. A fair construction of that language, in this connection, is that the second notes and mortgage were given by the same party to the same party, that is, by Cox to the defendant. It was not notice that they were given by Cox and wife to Douglass. Plaintiff was also informed by the answer, that such *renewed mortgage* was foreclosed, not a mortgage from Cox and wife to Douglass, and by him assigned to Ward. But more than all, plaintiff was not notified that on the fifteenth day of March, 1876, months before the commencement of

this action, Ward, by an instrument under seal, in consideration of one thousand eight hundred dollars, by him received of Derby, sold and transferred the notes and mortgage, absolutely, to the latter, as appears *prima facie* to have been the case, both from plaintiff's affidavit and exhibit D made a part thereof. Nor did she have notice that Derby, on the twenty-fourth day of January, 1877, received the sheriff's deed of the mortgaged property. Plaintiff cannot be presumed to have been apprised of any facts by the answer, save those that were stated therein, and such others as naturally flowed or followed from the ones set out.

We think she had no notice of the facts last stated, and it becomes necessary to ascertain whether they are important or not. They are of the greatest importance to plaintiff, under the finding of the court that the note sued on was not given in consideration of indebtedness found due upon settlement, if, being proven to the satisfaction of the court or jury, they would show a sufficient consideration for the note to sustain this action, regardless of such settlement.

Does the newly discovered evidence, if true, show a sufficient consideration for the whole amount of the note or any part thereof? As to the consideration necessary in case of an action upon a note, it is stated in Byles on Bills, p. 228, that "the same general rules as apply to the nature of the consideration for other simple contracts, are also applicable to the various contracts on a bill or note;" that is to say, there must have been some benefit to the maker, or some detriment to the payee. As we have seen, defendant alleges in his answer that he executed and delivered the note in question "for the purpose of securing plaintiff against all and singular the acts of defendant in the premises, and that defendant should well and truly account to plaintiff for her proportion of the moneys that should be collected from the sale of the mortgaged property, or from said Cox, and not otherwise." If plaintiff's affidavit be true, it is evident from defendant's answer, that the note was given to secure plaintiff against the very acts of defendant which were done, as well as those which were not done, by him. Defendant testified that the second mortgage had been

Opinion of the Court—Leonard, J.

foreclosed, and that he expected to get the money out of it in a few weeks or months, when he would pay it to plaintiff; that he had no interest in it except to the extent of two or three hundred dollars. Under such circumstances, it was incumbent upon him to show at least, that he still held the note and mortgage, and was in condition to control the proceeds of sale and to hand them over to plaintiff. There was, however, no such proof; but, on the contrary, the newly discovered evidence shows, if true, that months before this action was brought, the notes and mortgage were the property of Derby solely; that thereafter defendant had no control over them, and that neither plaintiff nor defendant had any property in them or any interest in the proceeds of the mortgaged premises; that at the time the new trial was granted, Derby was the absolute owner of the mortgaged property. Admitting it to be true that Ward acted as agent of defendant in getting the second notes and mortgage in the name of Douglass, and in having them assigned by the latter to himself, and that at the time the note sued on was executed by defendant, he had received nothing from Cox or upon the mortgage; that he had not at that time placed the notes and mortgage or his interest therein beyond his control; and admitting, also, for the purposes of this decision, that the note in question was not given upon settlement as claimed by plaintiff, still, if it be true that at the time this action was brought, or even at the date of trial, defendant, by himself or Ward, had disposed of the note and mortgage, and for a valuable consideration received from Derby, had sold and assigned absolutely to the latter, all interest in and lien upon the mortgaged property, thus rendering it impossible for him to foreclose, or cause to be foreclosed, the mortgage for plaintiff's use or benefit, or otherwise to perform the duties of his trust, we have no hesitation in saying there was a sufficient valuable consideration for the note sued on, to the extent of plaintiff's proportion of the whole value of the mortgaged property. Let us admit, for the sake of the argument, that at the time the note sued on was given, Ward held the Cox note and mortgage for plaintiff; that the latter,

at that time, was the real owner of both, and that defendant then owed plaintiff nothing. But let it be admitted further, that before this action was brought, and subsequent to the date of the note sued on, given to secure plaintiff against her liability of loss, as stated in the answer, defendant converted to his own use the eighteen hundred dollars paid by Derby for the note and mortgage, or deprived plaintiff of any benefit from, or interest in, the mortgage, by an absolute sale and assignment thereof.

Under such circumstances we think that plaintiff's liability of loss on account of defendant's possible misfeasance, was a sufficient consideration to uphold the note as a cause of action when it was executed, to the extent of plaintiff's proportion of the whole value of the mortgaged property. "To that extent," as was said in *Husselline v. Guild*, 11 N. H. 394, "the consideration, certainly, has not failed. On the contrary, it has been perfected, if that term is admissible." The case just cited was an action commenced June 13, 1838, on a promissory note dated November 18, 1835, for three thousand nine hundred and sixty-three dollars and twelve cents payable to plaintiff or order on demand. At the trial defendant Guild was defaulted, but subsequent attaching creditors were permitted to come in and defend the suit. It was admitted that Guild executed the note described in the declaration; but evidence having been introduced in the defense tending to show that the note might be held in some measure for the benefit of Guild, the plaintiffs offered to prove that on the fourth day of January, 1832, Guild was appointed guardian of one Searle, a minor, and on the same day gave a bond to the judge of probate, in the penal sum of ten thousand dollars, with the plaintiffs as his sureties, conditioned well and truly to discharge the office of guardian, to render a true account of such estate as should come to his hands, and to pay and deliver what should remain in his hands to Searle, when of full age, or otherwise, as the probate court should lawfully direct; that Guild afterwards, as guardian, received money to the amount of the note, and for which he was liable as guardian, and the plaintiffs as his sureties, at the time of the

Opinion of the Court—Leonard, J.

commencement of the suit; that the note was taken for the purpose of indemnifying the plaintiffs against their liabilities on the bond, and they engaged when the note was given, to save Guild harmless from any liability as guardian, to the extent of the money which might be recovered on the note; that Searle came of age January 3, 1839, and that on the fourth day of the same January, the plaintiffs paid Searle the sum of two thousand dollars, and took his discharge for that sum. The court below rejected the evidence offered, which was held error on appeal, and a new trial was granted. It will be noticed that in that case the note sued on was executed several years after the plaintiffs became liable on the bond, and long before they paid anything, or knew they would be required to pay anything on account of becoming sureties; as in this case, the note in question was given after defendant received plaintiff's money, and hence after plaintiff was liable to sustain loss in case of defendant's misfeasance, but before the note and mortgage were assigned to Derby. In that case the two thousand dollars were not paid by plaintiffs until about six months after they commenced action upon the note, but they were paid before the trial; while in this case the note and mortgage were sold to Derby before plaintiff brought her action, but it seems she was not aware of the sale until after trial. We quote from the opinion of the court:

“The plaintiffs, upon the execution of the note, had in fact no debt against the defendant such as appears on the face of the note to exist; and it is very clear that securities of this kind are not the most appropriate evidences of contracts to indemnify the payee for an existing liability for the maker. * * * A mortgage would undoubtedly better exhibit the true state of the case. But on the other hand, if a mortgage has not been given, justice may be promoted by permitting a surety to take from his principal some obligation upon which he may acquire a lien upon the property of the principal, and provide security for his indemnity in case of need, before he has been compelled to pay the money. And securities for this purpose appear, from the authorities cited, to have been sanctioned in England and

Opinion of the Court—Leonard, J.

Massachusetts. (*Little v. Little*, 13 Pick. 426; *Cushing v. Gore*, 15 Mass. 72; 2 D. and E. 104, 105; *Id.* 640.)

We do not see any solid grounds of distinction where the payee is surety in an administration bond, and where he is surety in some obligation, in terms for the payment of money. The result in both, if enforced against the surety, is to compel him to pay a sum of money. It may, perhaps, be said that the true ground of the defense is want or failure of consideration; for, if there is a sufficient consideration for the promise to pay a sum of money, there is no fraud in executing a note promising to pay it. And if a liability as surety may be held to be a good consideration for a note, the consideration must remain good to the extent of the money which has subsequently been paid upon the liability. In this case the sum of two thousand dollars was paid by the plaintiffs upon the liability before the trial. * * * There is, perhaps, no sufficient objection to holding that an existing, continuing liability as surety for another is such a damage to the party that it will form a sufficient consideration for a promissory note. It is clearly a good consideration for a mortgage, and it has been held a sufficient consideration to sustain an absolute conveyance."

We discover no difference in principle between that case and the one in hand. If the liability of a surety is sufficient to sustain a promissory note, executed long after the liability is incurred, but before any sum is paid, if payment is made by the surety before trial (and the cases holding that doctrine are numerous) much more was the actual giving up of money by plaintiff to defendant for a specific purpose and as a trust, with the liability of loss on account of defendant's misfeasance, a sufficient consideration for a note given to secure plaintiff against such loss. Let us suppose a case. A. employs B. to purchase county scrip, the latter agreeing to buy it, hold it until paid, and then faithfully hand over the proceeds. B. receives one thousand dollars, buys all the scrip he can for the money, and retains it in his possession. For the purpose of securing himself against possible loss on account of the wrongful acts of B., A. takes B.'s note in the sum of fifteen hundred dollars. B. draws

Opinion of the Court—Leonard, J.

the money on the scrip and retains it. We have no doubt that the consideration of the note would be ample to support an action, and that A. could recover thereon an amount equal to the amount received by B. And that case is the same in principle as this, if plaintiff's affidavit for a new trial is true.

Besides, inasmuch as plaintiff delivered her moneys to defendant, who undertook to invest them, take securities therefor and to account to her for the proceeds of the sale of the mortgaged premises, an action would have lain against him on that bailment, although no note had been given, if he had disposed of the securities for his own use and benefit instead of hers; or if by other gross mismanagement he had lost her money. (*Chitty on Cont.*, vol. 1, p. 42; *Story on Bailm.*, secs. 164, 171 *et seq.*, and 188; 2 Johns. Cas. 92.)

In *Watson v. Turner*, Bull. N. P. 147, overseers of the poor, were held liable to an apothecary for his attendance, though not ordered by them, and a subsequent promise by them to pay was held not to be a *nudum pactum*, because they were bound by law to provide for the poor. (*Wennall v. Adney*, 3 Bos. & P. 250, note.)

In *Warner v. Booge*, 15 Johns. 233, it was held that where a party in suit became entitled to costs from the opposite party, who promised to pay the bill, the promise was founded on a sufficient consideration and would support an action.

After plaintiff delivered her money to defendant, the latter was under a legal obligation to perform the duties of his trust, without the note, and that obligation was a sufficient consideration to uphold the note as a cause of action when it was given, to the extent of plaintiff's loss caused by the misfeasance of defendant; that is to say, if the affidavit for a new trial is true, the consideration of the note in suit is at least sufficient to sustain a recovery to the extent of plaintiff's proportion of the value of the property mortgaged.

We have thus far discussed the question of consideration upon the pleadings, admitted facts and newly discovered evidence, without regard to plaintiff's claim that the note

Opinion of the Court—Leonard, J.

sued on was given upon full settlement with defendant, concerning which fact the testimony was very conflicting. Upon the new trial, if the court or jury should conclude there was such settlement, and that the note in question was given in consideration of indebtedness found due plaintiff, these facts alone will entitle plaintiff to recover the whole amount claimed. Should the conclusion be against such settlement, then the principles hereinbefore stated will govern the court upon the question of consideration.

Against plaintiff's objections at the trial, defendant was permitted to testify that at the time the note in question was executed, it was given "upon the complete understanding that she (plaintiff) was to get her money out of the mortgage when it was collected; and not before." If such testimony was admissible for any purpose, it was solely as a defense to the consideration. (Pars. Notes and Bills [2 ed.], vol. 1, 523; vol. 2, 501 *et seq.*) In an action upon a negotiable promissory note, a sufficient valuable consideration is at first presumed, and to show a want or failure of the same, the burden of proof is upon the defendant. (Story on Bills of Ex. 209; Pars. Notes and Bills, vol. 1, 175.)

Under the facts pleaded and admitted by defendant, it was incumbent upon him to show either that he had performed the duties of his trust or was in condition to do so, or such facts as excused him from such performance. We fail to perceive how the testimony mentioned proved or tended to prove either fact just stated, or how it in any manner sustained the defense of want of consideration.

In reply to a question asked plaintiff by the court, she testified as follows: "I consider the mortgage and money invested in it as mine; there never was any understanding between defendant and me, by which he was to become the owner of the mortgage and money secured thereby, or become liable on the note; there never was any other consideration for defendant's note, except that he had moneys of mine under his control, loaned out for me." A part of that testimony was apparently opposed to what she had before stated, and was against plaintiff's whole theory

Opinion of Beatty, J., concurring.

of the case. But however that may be, and presuming that she testified as stated, it matters not who, in her opinion, was the owner of the note and mortgage. She did not know at the trial what is set out in the affidavit, that defendant had previously disposed of the Cox note and mortgage, and thus disqualified himself from performing the duties of his trust. And if she did then consider the mortgage and the money invested as her property, with the light then before her, that fact does not change her legal rights, if her affidavit is true.

The order granting a new trial is affirmed.

BEATTY, J., concurring:

I concur in the order of affirmance, but to sustain the action of the district court I think it quite unnecessary to resort to the newly discovered evidence. The facts alleged in the answer in my opinion do not constitute a defense to the action. So far from showing that there was no consideration for the note, they show that there was a valuable and adequate consideration. The defendant was, according to his own version of the facts, liable to the plaintiff as her trustee. She had a right to hold him accountable in that character, and to demand the proceeds of his investments of her money; and he had a right, if his conduct in her affairs had been without fault, to discharge his obligation to her by turning over the securities in which he had invested her money. But if, instead of settling in that way, he chose to give, and she chose to take, his promissory note for a sum of money less than was actually due her, the validity of such a settlement cannot be questioned. His liability as trustee was thereby extinguished, and he became, in fact as well as in name, the owner of the mortgage and the debt thereby secured. This was a good consideration for the note, and all the answer alleges, and all the defendant's evidence amounts to, is that there was a contemporaneous verbal agreement that the note was not to be paid according to its tenor, but was to be satisfied out of the proceeds of the Cox mortgage. In my opinion, no evidence of any such agreement should have been received or

considered, as its only effect was to contradict the terms of the note.

This view of the case, if correct, is conclusive in favor of the plaintiff, regardless of the weight of evidence upon the disputed facts. I wish to add, however, that in my opinion the finding of the court ought to have been in favor of the plaintiff on the evidence adduced at the trial. The defendant's testimony was in direct conflict with his own written acknowledgments; that of the plaintiff was plain, straightforward and consistent, not only with the written evidence, but with itself. I do not agree with the court that it presents even an apparent inconsistency. The plaintiff had testified clearly and distinctly that the note was given in full and final settlement of all her claims on the defendant by reason of his investments for her. Up to the day it was given she had never heard of the Cox note and mortgage. Defendant had pretended that her money was invested in loans to other parties, and in mining stocks. Three months after the date of the note, defendant for the first time proposed to transfer to the plaintiff the Cox note and mortgage in satisfaction of his note, and she agreed to take it, not because she thought her money was invested in it, but because she feared if she refused to take that she would get nothing.

It was with reference to this agreement, made three months subsequent to the execution of the note sued on, that she gave a woman's opinion that the mortgage and money invested in it were, at the date of the trial, hers. Her further statement that there never was any understanding between the defendant and her by which he was to become the owner of the mortgage and become liable on the note, in the light of her other testimony, means no more than this: That after she first heard of the Cox mortgage in April, 1876, there never was but one understanding in regard to it, and that was that it was to be assigned to her in satisfaction of the defendant's note.

[No. 895.]

**JOHN STEEL, RESPONDENT, v. SOLID SILVER GOLD
AND SILVER MINING COMPANY, APPELLANT.**

PLEADINGS—ADMISSIONS IN ANSWER—AUTHORITY OF PRESIDENT OF CORPORATION—NONSUIT.—Plaintiff testified that he was employed by one Hewson, who claimed to be the president of the defendant; the answer was verified by Hewson as defendant's president, and admitted that plaintiff went into defendant's employ, etc.: *Held*, that such admissions and proofs were *prima facie* evidence that Hewson was authorized to employ the plaintiff, and that the court did not err in refusing a nonsuit.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

Lewis & Deal, for Appellant.

A. B. Elliott, for Respondent.

By the Court, LEONARD, J.:

This is an action to recover nine hundred and forty-nine dollars, alleged to be due plaintiff from defendant for labor performed by the former for the latter, as defendant's superintendent, between September 1, 1876, and March 15, 1877, at an agreed price of one hundred and fifty dollars in gold coin per month, and for money paid out by plaintiff for defendant; also, for goods sold and labor performed by other persons for defendant, at its special instance and request, the latter demands having been assigned to plaintiff. The jury found a verdict for plaintiff in the sum of eight hundred and seventy-two dollars. Defendant moved for a new trial on the grounds of insufficiency of evidence to justify the verdict and errors in law occurring at the trial. This appeal is taken from the order overruling the motion for a new trial, and from the judgment.

After plaintiff rested, defendant moved for a judgment of nonsuit, "because there was no showing that defendant ever employed plaintiff, or that one Hewson (who did employ him), was an officer of, or had any authority to act for, defendant." The court overruled the motion, and its action

in this regard only is urged by counsel for defendant as error.

Under the pleadings in this case, it is not necessary to decide whether or not the president of a mining company can bind the latter by contracts of employment made, or for supplies used, in the usual business of such company, without authority to enter into the same from the board of trustees.

In the first count of the complaint plaintiff alleges that on or about September 1, 1876, he and defendant entered into an agreement, whereby plaintiff undertook and agreed to perform the duties of superintendent of defendant's mining claim in Storey county, and defendant agreed to pay plaintiff therefor one hundred and fifty dollars in United States gold coin per month; that plaintiff entered the employ of defendant under such contract on said day, and so continued until March 15, 1877; that by reason of the premises defendant became indebted to him on account of said labor in the sum of nine hundred and seventy-five dollars, no part of which has been paid, etc.

In the answer defendant denies "that at the time in said complaint alleged, or at any time, the plaintiff and defendant made or entered into the alleged agreement in said complaint set forth;" denies "that defendant undertook, promised or agreed to pay plaintiff for the alleged services * * or for any services to be done or performed by plaintiff the sum of one hundred and fifty dollars per month, or any sum whatever;" denies "that plaintiff continued to work for defendant to and including the fifteenth day of March, 1877, or to any date later than the first day of November, 1876;" denies "that defendant became, is, or ever was, indebted to plaintiff in the sum of nine hundred and seventy-five dollars, or in any other sum, except as hereinafter set forth;" that is to say: "On or about November 1, 1876, defendant and plaintiff accounted together of and concerning all transactions and dealings theretofore had or existing between said parties, and thereupon found the sum of two hundred and thirty-nine dollars due plaintiff from defendant; that defendant at divers times from said November 1, 1876, to

Opinion of the Court—Leonard, J.

March 1, 1877, paid to plaintiff the sum of one hundred and seventy-one dollars; that defendant tendered to plaintiff on or about March 1, 1877, at Virginia city, the further sum of sixty-eight dollars in full payment and satisfaction of said indebtedness, and is still ready and willing to pay said sum to plaintiff, but that plaintiff refused at the time of such tender, and still refuses to receive the same; that since said first day of November said plaintiff has neither done nor performed any work, labor or services, or paid out any money for said defendant."

It can not be doubted under the pleadings stated in substance above, that there was no necessity of showing by proof, that Hewson was authorized by the trustees of defendant to employ plaintiff. At the time the motion for nonsuit was made, plaintiff had testified that he was employed by Hewson alone, who claimed to be defendant's president, and letters had been introduced signed by Hewson as president and Applegate as secretary, dated at the office of the company in San Francisco, recognizing plaintiff as defendant's agent, and giving orders as to plaintiff's duties. Plaintiff had testified as to the period of his employment and the character of his services; also that Hewson in September, 1876, represented to plaintiff that he (Hewson) had informed the trustees and stockholders of defendant that plaintiff was to receive four dollars per day; that he refused to continue work for such sum; that Hewson then agreed to pay him forty-four dollars for the eleven days' work in July, and one hundred and twenty-five dollars for the month of August, and thereafter one hundred and fifty dollars per month. The answer was verified by Hewson, who swore that he was defendant's president. By the answer, defendant admitted that plaintiff went into defendant's employ September 1, 1876, and so continued until November 1, 1876. Such admission, together with plaintiff's testimony that he was employed by Hewson as president of defendant, and by no one else, was *prima facie* evidence at least that Hewson was authorized to enter into a contract of employment. It was, then, for the jury to decide from the evidence what amount, if anything, defendant agreed to pay

Points decided.

plaintiff, as well as the length of time he continued in such employment. In the second count of the complaint it is alleged, that between September 1 and October 1, 1876, Peasly & Mercer, at the special instance and request of defendant, performed labor in and about defendant's mine, which labor was reasonably worth the sum of forty-seven dollars; that defendant agreed to pay Peasly & Mercer said sum; that no part had been paid, and that on the seventeenth day of March, 1877, Peasly & Mercer sold, assigned and delivered said demand to plaintiff.

In the answer defendant denied that the work was of any greater value than nineteen dollars, and denied also that it promised to pay any sum therefor. There was no denial that defendant ordered the work done, and plaintiff testified that it was ordered by himself and Hewson. Defendant was therefore liable under its denial alone, for the reasonable value of the work as stated in the answer, without proof that Hewson, who ordered it done, had authority to make the order. And a recognition of Hewson's authority to bind defendant to the extent of the reasonable value of Peasly & Mercer's work, was certainly some proof of his authority in relation to his contract with the plaintiff. What we have said of the second count is also true of the third.

The court did not err in denying defendant's motion for a nonsuit; and the order and judgment appealed from are affirmed.

[No. 908.]

**CHRISTIAN MARTENS, RESPONDENT, v. ANNA J.
GILSON, APPELLANT.**

STATEMENT—IDENTIFICATION OF DOCUMENTS.—The statement reads: "The agreed statement of facts, findings of the court, are hereby referred to, and made the statement on motion for new trial." *Held*, that the fact that such papers were in the transcript entitled in this suit, the statement of facts signed by respective counsel, and findings of fact by the district judge and referred to as above, was a sufficient identification to authorize this court to examine them. (HAWLEY, C. J., dissenting.)

**FORECLOSURE OF MORTGAGE—JUDGMENT FOR DEFICIENCY NOT A LIEN ON
HOMESTEAD PROPERTY.**—Where homestead property is sold under a fore-

Opinion of the Court—Hawley, C. J.

closure of mortgage, and afterwards redeemed by the vendee of the mortgagor: *Held*, that the lien of the mortgage was satisfied by the sale and redemption of the property; that when the mortgage lien was satisfied the homestead rights attached, and that the judgment for the deficiency in the foreclosure suit did not create any lien against the real and beneficial estate in the land.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

T. W. W. Davies, for Appellant.

Under the laws of this state (secs. 233-35 of the Civ. Pr. Act, 234, Stat. 1869) the unsatisfied judgment under which the sale was made is expressly excepted from payment by a redemptioner. This matter is discussed in 1 Hill. on Mort. 407, par. 3 *et seq.*; 2 Id. 278, 501; see also, Herman on Executions, secs. 141, 142. (1 Hill. Mort. par. 33, 407.)

R. M. Clarke, for Respondent.

I. The agreed statement of facts and the findings of the court are not contained in the statement on motion for new trial, nor authenticated as required by the statute. (Civ. Pr. Act, 197; *White v. White*, 6 Nev. 20; 31 Cal. 657.)

II. The judgment of Martens was a lien upon the land in question from the time it was docketed. (Civ. Pr. Act, sec. 248.) The mortgage did not pass the title to the mortgagee, nor did the title pass to Martens under the foreclosure proceedings at all, but remained in Bollen subject to the lien of the judgment. And in purchasing Bollen's title, Gilson took it charged with the lien of the judgment. (*McMillan v. Richards*, 9 Cal. 365.)

By the Court, HAWLEY, C. J.:

Respondent moves to strike out the agreed statement of facts and the findings of facts by the court, as inserted in the transcript, upon the ground that they are not embodied in the statement on motion for a new trial, nor authenticated or identified, as required by section 197 of the civil practice act.

Opinion of the Court—Hawley, C. J.

The statement on motion for a new trial reads as follows: "The * * * agreed statement of facts, findings of the court, are hereby referred to and made the statement on motion for new trial."

The transcript contains certain loose papers which purport to be an agreed statement of facts, signed by the respective counsel, and a finding of facts, signed by the district judge. I am of opinion that these papers ought to have been included in the statement; or that the judge should have designated them "as having been read or referred to" on the motion for new trial (Civil Practice act, sec. 197), but in the judgment of a majority of the members of this court, the fact that they are entitled in this suit, signed as above stated, and referred to in the statement on motion for new trial, which is certified to as correct by the respective attorneys, is a sufficient identification to authorize this court to examine them. The motion to strike out is denied.

The facts relative to the merits are as follows: One Bollen being the owner of certain lands in Douglas county, mortgaged the same to the plaintiff Martens. The mortgage was foreclosed, and Martens became the purchaser of the property for a less sum than was named in the decree of foreclosure, and a judgment in his favor was regularly docketed for the amount of the deficiency. Subsequently Bollen sold and conveyed his equity of redemption to one Johnson, and thereafter Johnson sold and conveyed the same to the defendant Gilson. Within six months after the sale in the foreclosure suit, defendant Gilson redeemed the property by paying to the sheriff of Douglas county the amount for which the property was sold to the plaintiff, with interest, costs and percentage as required by law. Two days thereafter, the plaintiff Martens caused an execution to be levied under his deficiency judgment, and the property was sold under this execution, and the plaintiff became the purchaser. Having obtained a sheriff's deed for said property under such sale, he claims to be the owner of the property.

At the time of the execution of the mortgage by Bollen and wife to Martens, the property mortgaged was held as a homestead. A declaration of homestead was filed, and no declaration of abandonment was ever executed.

Points decided.

Conceding, for the purposes of this decision, that the equity of redemption is the real and beneficial estate in the land, and that it may ordinarily be levied upon and sold under execution (*McMillan v. Richards*, 9 Cal. 365; *Alexander v. Greenwood*, 24 Id. 512; *Trimm v. Marsh*, 54 N. Y. 599), yet the fact remains that in this case the property mortgaged was claimed and properly held as a homestead. The mortgage lien against the homestead was satisfied by the sale and redemption of the property under the decree of foreclosure. When the mortgage lien was satisfied the homestead right attached. In such a case the judgment for the deficiency did not create any lien against the real and beneficial estate in the land, because the homestead rights had never been abandoned.

The defendant Gilson, by her purchase and redemption, obtained the same rights to which Bollen was entitled. "She stands in his shoes," and gets whatever estate Bollen had when he sold his right of redemption. (*Gilson v. Boston*, 11 Nev. 414.)

The judgment and order appealed from are reversed and the cause remanded, with instructions to the district court to enter a judgment, upon the agreed statement of facts, in favor of the defendant for her costs.

[No. 906.]

L. RICHARDSON, RESPONDENT, v. S. F. HOOLE,
APPELLANT.

PLEADINGS—WAIVER OF OBJECTIONS TO FORM.—Objections to the form of a complaint are waived by a failure to demur.

IDEM—SUFFICIENCY OF COMPLAINT.—A complaint alleging that plaintiff is a sub-contractor for the erection of the walls of a state prison, and responsible for the labor thereon; that defendant (the architect for the state) had, pursuant to an agreement with plaintiff and the principal contractor, received from the state, for the use and benefit of plaintiff, the sum of fifteen thousand dollars, and had only paid out on plaintiff's account ten thousand dollars, and refused to pay over or account for the remaining five thousand dollars; states facts sufficient to constitute a cause of action.

Opinion of the Court—Beatty, J.

CONFLICT OF EVIDENCE.—Testimony reviewed and held sufficient to sustain the verdict.

ERROR—MUST BE PREJUDICIAL.—An error in refusing to admit testimony is cured by the admission of the same testimony at a subsequent stage of the trial.

IMMATERIAL TESTIMONY—WHEN ADMISSIBLE.—Where the defendant was permitted to show that he had overdrawn his bank account for the purpose of showing that he had loaned his credit to plaintiff: *Held*, although the testimony was immaterial, that plaintiff had the right to show by the same witness that the overdrafts were on account of defendant's stock speculations.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

Thomas E. Haydon, for Appellant.

Boardman & Varian, for Respondent.

By the Court, BEATTY, J.:

The substance of the complaint in this action is that the plaintiff was a sub-contractor under William Thompson for the erection of the walls of the state prison at Reno; that, as such contractor, he was responsible to laborers and others for all debts incurred in carrying on the work, and was entitled to receive payments of money from the state as the work progressed; that the defendant received from the state, through Thompson, on account of the contract, and for the use and benefit of plaintiff, sums amounting in the aggregate to fifteen thousand dollars, which he promised and agreed to and with plaintiff and Thompson to pay over and account for as follows: First, to pay all claims of laborers and others against or on account of the work, and then to pay the balance to plaintiff; that he has paid out, on account of such claims, not exceeding ten thousand dollars, and refuses, though requested so to do, to pay over or account for the remaining five thousand dollars.

The answer of the defendant admits the receipt of ten thousand seven hundred and forty-nine dollars and sixty-six cents from the state on account of the contract price of the prison walls, but avers that the money was received in

Opinion of the Court—Beatty, J.

accordance with an agreement between plaintiff and defendant to the following effect: Plaintiff, being anxious to procure from Thompson an assignment of his contract with the state, and being a stranger without means or credit sufficient to enable him to carry on the work, agreed that if defendant would negotiate the purchase of the contract, and assist him with his means and credit in completing it, he would pay defendant two thousand five hundred dollars during the progress and on the completion of the building. The defendant, in consideration of this promise, procured the assignment of the contract from Thompson, aided with his means and credit in completing it, and kept all plaintiff's accounts with laborers and material-men. He also, for the protection of himself and Thompson against claims of laborers and material men, agreed to and did receive and disburse the money coming from the state. He avers that of the amount so received he paid out on account of labor and materials all but one thousand forty-nine dollars and eighty-seven cents, leaving the plaintiff still indebted to him in the sum of one thousand four hundred and fifty dollars and thirteen cents, the balance of the contract price of his services, for which he prays judgment. There is also a *quantum meruit* count for the same services in which they are alleged to be reasonably worth two thousand five hundred dollars.

Upon these pleadings the case was tried, and a verdict and judgment rendered in favor of the plaintiff for seven hundred and fifty dollars. Defendant moved for a new trial, which was denied, and he now appeals from the judgment and order denying his motion for a new trial.

The first point made in support of the appeal is that the complaint did not state a cause of action. To sustain this proposition it is argued that there was no consideration for the promise of defendant to disburse the money received by him and keep the necessary accounts and vouchers. It may be conceded that there was no consideration for that promise, and that the defendant was not bound to perform it; but, having received plaintiff's money, he is bound to account for it in some way (unless he is entitled to keep it,

Opinion of the Court—Beatty, J.

which, we think, would scarcely be claimed), and it makes no difference whether plaintiff's cause of action was legal or equitable, nor what would have been the proper form of action at law before the code. If any objection could ever have been taken to the form of the complaint, it was waived by the failure to demur. The only question here is, did the complaint, favorably construed, state any cause of action? and there can be no doubt that it did.

It is next claimed that a new trial should have been granted upon the ground that the verdict was contrary to all the evidence in the case.

We think the evidence amply sustains the verdict. The defendant admitted in his answer the receipt of upwards of one thousand dollars more than he had paid out on plaintiff's account, and the burden was upon him to show not only that he had made the payments which he claimed to have made, but also that he was entitled to receive anything from the plaintiff on account of his alleged services. In attempting to do this he developed the following somewhat peculiar state of facts:

Thompson had commenced work under his contract with the state, and had given a bond with sureties in the sum of fifty thousand dollars, conditioned for the faithful completion of the work according to the specifications, and for the delivery of the same to the state free and clear of all claims or liens for labor or materials.

The defendant was the architect employed by the state to look after its interests. As such architect it was his duty, among other things, to see that the work was properly done; that good materials were used, and that all claims for labor and materials were paid as the work progressed, and before the payment by the state of the full contract price.

This being the state of affairs, the plaintiff was desirous to procure an assignment of the contract, but as the state held Thompson and his sureties responsible for its completion, he (Thompson) made it a condition of the assignment that the money to be paid by the state should pass through the hands of the defendant, to be applied in the first place to the discharge of all claims against or on account of the

Opinion of the Court—Beatty, J.

building, and the balance remaining to be paid to plaintiff. The defendant, being consulted, assented to this arrangement, and a written contract of assignment was accordingly entered into between Thompson and the plaintiff. The defendant was not a party to this contract, but it was provided therein that he should receive and disburse the money as above specified, and Thompson and plaintiff both testify that he agreed with them without anything being said about any compensation for his services, that he would so receive and disburse it. They both testify that the arrangement was made solely for the advantage and protection of Thompson and his sureties, and that there was no other contract or agreement with the defendant whatever. The defendant, on the other hand, testified to the express contract set up in his answer; that he negotiated the assignment of the contract to plaintiff; that he superintended the work for plaintiff; that he kept his accounts; that he purchased on his own credit the materials used in the construction of the prison walls, and that he had paid out all the money received from the state except seven hundred and seventy-six dollars. This last item of his testimony is opposed to the admission of his answer that he had retained upwards of a thousand dollars on account of his services, but it was admitted without objection, and he will be allowed the advantage of it. He also offered the testimony of an expert that services such as he claimed to have rendered were reasonably worth two thousand five hundred dollars, and there was no opposing testimony on that point.

Upon this it is contended that he was entitled to a judgment for the difference between two thousand five hundred dollars, the reasonable value of his services according to the uncontradicted testimony of McKay, and seven hundred and seventy-six dollars, the amount retained by him out of the money received from the state. This, however, is a *non sequitur*, and the vice of the argument consists in the assumption that the rendition of the services for the plaintiff, as well as their value, was undisputed. Nothing can be further from the truth than the assumption. The plaintiff denied the rendition of any services except those

Opinion of the Court—Beatty, J.

specified in the complaint, and he and Thompson both testified that they, so far as they were not due to the state from the defendant as architect, were rendered for the benefit and advantage of Thompson exclusively. Taking the plaintiff's version of the contract and defendant's statement of the account, the verdict should have been for seven hundred and seventy-six dollars instead of seven hundred and fifty dollars. The plaintiff owed defendant nothing for his services. On the contrary, it appears that the plaintiff was seriously inconvenienced, and his business deranged by the retention of his money in defendant's hands.

Several rulings of the court made during the progress of the trial are assigned as errors: 1. Thompson testified for plaintiff in regard to the agreement between himself and plaintiff and defendant. On cross-examination he was asked what compensation defendant was to have for the services to be rendered under the agreement between him and plaintiff. This question was objected to, and the objection sustained by the court, defendant excepting. The ground of the objection, we presume, was that the question referred to the contract set up in the answer, and not to the one set out in the complaint. At any rate, it was upon that ground that the court sustained the objection. Counsel, it is true, said to the court that they meant only to inquire about the contract as to which the witness had testified in chief; but they did not alter the form of the question so as to make its meaning clear and unambiguous, as they might have easily done. This alone might be sufficient to sustain the action of the court, but admitting that the ruling was technically erroneous, it is very clearly shown, not only that the error was harmless, but that it was cured by Thompson's answer to the same question at a subsequent stage of the trial. In the first place, it was harmless, because the defendant, in his own testimony, does not pretend that Thompson ever heard the plaintiff promise him any compensation; and in the second place, Thompson testified in rebuttal that plaintiff did not promise anything to his knowledge.

But counsel contends that the question was not only

Opinion of the Court—Beatty, J.

material, but that it was allowable on cross-examination for the purpose of probing "the motives, prejudices, inclinations," etc., of the witness. We do not see that the question could have served any such purpose, and besides, the defendant had the advantage of Thompson's answer for every purpose it could possibly serve.

2. The defendant, on cross-examination of one of plaintiff's witnesses—a banker—called out the fact that during the construction of the prison walls the defendant's bank account was frequently overdrawn. On the re-direct examination of this witness plaintiff was permitted to show that defendant's overdrafts were on account of stock speculations. Defendant moved to strike out all the testimony relating to his stock transactions, and the motion was overruled.

If, as the appellant contends, the fact of his overdrafts had a tendency to prove that he had loaned his credit to the plaintiff, then certainly it was competent for the plaintiff to show that the overdrafts were on account of defendant's own peculiar business. It seems to us that the fact that defendant's bank account was overdrawn had very little relevancy to any issue in the case; but the defendant, having called it out for the purpose of showing that he had loaned his credit to plaintiff, could not object to the explanation, and his motion to strike out the one and leave the other was properly overruled.

3. The court refused to allow counsel to cross-examine plaintiff as to how he was enabled to get the assignment from Thompson. The ruling was correct. The plaintiff was testifying in the opening of his own case, and the testimony sought to be elicited related solely to the affirmative defense set up in the answer. The time to have asked the question was when the plaintiff testified in rebuttal, and in effect it was asked and answered.

These are all the assignments of error. They are without merit, and the judgment is affirmed.

Points decided.

[No. 931.]

A. DUQUETTE ET AL., RESPONDENT, v. D. OUILMETTE
ET AL., APPELLANTS.

SUBSTANTIAL CONFLICT OF TESTIMONY SUFFICIENT TO SUSTAIN FINDINGS OF
THE COURT.

APPEAL from the District Court of the Second Judicial
District, Washoe County.

The facts sufficiently appear in the opinion.

Boardman & Varian, for Appellants.

Thomas E. Hayden, for Respondents.

By the Court, HAWLEY, C. J.:

Plaintiffs brought this action to recover a balance alleged to be due upon a contract for cutting wood. The cause was tried by the court without a jury. The findings of the court are in favor of the plaintiffs upon all the issues raised by the pleadings. Appellants claim that the evidence is insufficient to justify the findings in certain specified particulars.

We have carefully examined the testimony, and find a substantial conflict upon all material points. We are of opinion that the testimony is sufficient to sustain the findings of the court in every particular.

The judgment of the district court is affirmed.

[No. 905.]

L. D. WICKS, RESPONDENT, v. M. LIPPMAN, APPELLANT.

PARTNERS—WHEN ACTION BETWEEN, MAY BE SUSTAINED AT LAW.—An action at law by one partner against another to recover a balance due on settlement of accounts can be maintained if there has been a balance found and agreed upon between the partners.

IDEM.—Where the adjustment of the matters in controversy does not involve the settlement of any partnership accounts, the action at law can be maintained.

Argument for Respondent.

CREDIBILITY OF WITNESS—CROSS-EXAMINATION.—A witness, upon cross-examination, may be asked concerning his past life, as to whether he has ever been in the state prison, and if so, for what offense, for the purpose of affecting his credibility as a witness.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion and head notes.

Robert M. Clarke, for Appellant.

The agreement of dissolution and settlement is final and conclusive between the parties in this form of action. The plaintiff's remedy, if any, is in equity, for fraud or mistake, and for an accounting, and in an action Lippman would be answerable only for half. (Collyer on Part. secs. 264 to 269, 276 to 281, and note 1 and cases cited on page 262-3-4; *Ross v. Cornell*, 45 Cal. 133.)

William Cain, also for Appellant.

Boardman & Varian, for Respondent.

I. An action upon breach of an express stipulation between partners will be sustained, as it does not involve the entire partnership accounts. (*Wiggin v. Cummings*, 8 Allen, 353; *Capen v. Barrows*, 1 Gray, 376; *Bedford v. Brutton*, 1 Bing. (N. C.) 407; *Andrews v. Ellison*, 6 J. B. Moore, 199; *Estes v. Whipple*, 12 Ver. 373; *Ridgway v. Grant*, 17 Ill. 117.) There was a clear appropriation of this money to the respondent. It was really a balance struck. (Pars. Part. 2 Ed. 278, marg. page; *Russell v. Grimes*, 46 Mo. 410; *Crosby v. Nichols*, 3 Bosw. 450; *Jackson v. Stopherd*, 2 Comp. & M. 361; *Coffee v. Brian*, 3 Bing. 54; *Cross v. Cheshire*, 7 Exch. 43; *Parsons*, 284, marg. page; *Bond v. Hays*, 12 Mass. 34; *Chase v. Garvin*, 19 Me. 211; *Biles v. Bangs*, 36 Wis. 131; *Hale v. Wilson*, 112 Mass. 444; *Adams v. Funk*, 53 Ill. 219; *Dakin v. Graves*, 48 N. H. 45; *Hunt v. Morris*, 44 Miss. 314.)

II. We were entitled to show the past life of the witness, his associations, etc., not for the purpose of excluding him, but to affect his credibility. (*Real v. People*, 42 N. Y. 281;

Wharton on Evidence, 541, note 567; *Howser v. Com*, 51 Penn. St. 332; *Wilbur v. Flood*, 16 Mich. 40; *State v. March*, 1 Jones L. (N. C.) 526; *State v. Garrett*, Busbee, 357; *Com v. Bonner*, 97 Mass. 587.)

By the Court, HAWLEY, C. J.:

Wicks and Lippman were copartners, engaged in business as merchants. On the fourteenth of November, 1876, the partnership was dissolved by mutual consent. Wicks agreed to pay Lippman three hundred and three dollars and eighty-eight cents; to take the book accounts and stock of goods on hand and settle all the outstanding indebtedness of the firm. After paying the said sum of three hundred and three dollars and eighty-eight cents, Wicks discovered that several of the accounts standing upon the books in favor of the firm had actually been paid to Lippman prior to the dissolution, and that Lippman had failed to give credit for the same. This action was brought to recover the amount of these accounts.

1. Appellant claims that plaintiff could only recover, if at all, by instituting proceedings in a court of equity to repudiate his contract of purchase, and to open up and settle the accounts between the partners. This position is not, in our opinion, tenable.

In order to enable one partner to maintain an action at law against his copartner for a balance due on settlement of accounts, it is necessary that there should have been a balance found and agreed upon by both parties. (*Ross v. Cornell*, 45 Cal. 136; *Ridgeway v. Grant*, 17 Ills. 118; *Parsons on Partnership*, 278.)

The testimony offered upon the part of the respondent shows that both parties examined the books and accounts kept by the firm; that Wicks believed, and had good reason to believe, that the accounts sued for had not been paid; and that there was fraud or deception upon the part of Lippman in failing to give the proper credits, or to notify Wicks that the accounts had been paid.

It is expressly averred in the complaint that a final balance was struck and ascertained, and this allegation is not

 Points decided.

denied in the answer. We are of the opinion that the facts of this case bring it substantially within the rule above stated. The accounts are shown to have been "cut out from the partnership," and this is all that the law requires. (Parsons on Partnership, 282.)

An action at law can always be maintained by one copartner against another for any money that has been withdrawn by him in excess of his share. (*Wiggin v. Cumins*, 8 Allen, 354.)

In the present case it appears that Wicks, in ignorance of the true state of the accounts, was induced by the deception of Lippman to pay more than he would have paid had he been informed of the true state of the facts, and inasmuch as the adjustment of the matters in controversy does not involve the settlement of any partnership accounts, the plaintiff is, upon well-settled principles, entitled to maintain this action. (Parsons on Partnership, 284; *Adams v. Funk*, 53 Ills. 219; *Russell v. Grimes*, 46 Mo. 411; *Crosby v. Nichols*, 3 Bosw. 450.)

2. The authorities cited by respondent clearly establish the fact that the court did not err in allowing plaintiff's counsel to cross-examine the defendant, touching his past life, for the purpose of affecting his credibility as a witness.

The judgment of the district court is affirmed.

 [No. 916.]

STATE OF NEVADA, RESPONDENT, v. JAMES TICKEL, APPELLANT.

CRIMINAL LAW—DEPOSITIONS ON PRELIMINARY EXAMINATION—IMPEACHMENT OF WITNESS AT TRIAL.—When the deposition of a witness has been taken on preliminary examination, and the witness is present at the trial: *Held*, that the deposition may be used for the purpose of impeaching the testimony of the witness.

IDEM—COURT CANNOT INSTRUCT JURY AS TO FACTS.—The question whether a witness is unworthy of belief is to be decided by the jury upon the evidence, without comment or instructions by the court upon questions of fact.

IDEM—REMARKS OF THE COURT.—During the trial the court asked a witness: "Don't you ever make mistakes in taking down testimony in a justice's

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Argument for Appellant.

court?" and after the reply: "It may be possible, your honor, but we try not to," made the remark, in the presence of the jury: "Well, if you don't you are the first justice of the peace I ever heard of who does not make a mistake occasionally:" *Held*, that the remarks were in substance and effect an instruction to the jury upon questions of fact, and were in violation of defendant's constitutional rights.

INSTRUCTION—REAL OR APPARENT FACTS.—An instruction to the jury that, in considering whether or not the defendant was guilty, it was their duty to carefully scrutinize all the testimony in the case, and not to be misled by apparent, but not real, facts, is not calculated to mislead the jury.

IDEM—MALICE—ASSAULT WITH INTENT TO KILL.—An instruction which is so worded as to convey the idea that "malice or deliberate purpose on the part of the defendant" is a necessary element of the crime of assault with intent to kill: *Held*, erroneous.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

Thomas Wren and Crittenden Thornton, for Appellant.

I. Depositions taken in a criminal case on preliminary examinations, prove that the testimony which purports to have been given, in fact, was given. The only point open to denial is the identity of the person making the deposition. (Roscoe's Crim. Evid. 73; *Rex v. Wylde*, 6 Carr. & Payne, 380; 25 E. C. L. 346, cited Roscoe, 816, 817; *Rex v. Thornton*, cited 2 Russell on Cr. 894 in notes; 2 Phill. Ev. 235-37; 1 Green. Ev., secs. 227, 275, 277.) The depositions, when returned to the custody of the clerk of the district court, under the certificate of the justice, become judicial records, and as such, parol evidence is not competent to vary or contradict them, or impeach their correctness. (*Brintnell v. Foster*, 7 Wend. 103; *McLean v. Hugarin*, 13 Johns. 184; *Posson v. Brown*, 11 Id. 166; *Hard v. Shipman*, 6 Barb. 621; *Smith v. Compton*, 20 Id. 268.)

II. The comments of the judge upon the facts were wholly unjustifiable and palpably erroneous. (*McMinn v. Whelan*, 27 Cal. 300; *People v. Bonds*, 1 Nev. 35; *State v. Millain*, 3 Nev. 469; *State v. McGinnis*, 5 Id. 337; *State v. Ah Tong*, 7 Id. 148; *State v. Harkin*, 7 Id. 383; *People v. Levison*, 16 Cal. 98; *People v. Ah Fung*, 17 Id. 379; *People*

Opinion of the Court—Leonard, J.

v. *Williams*, 17 Id. 142; *People v. Strong*, 30 Id. 151; *People v. Dick*, 37 Id. 279.)

John R. Kittrell, Attorney-general, for Respondent.

I. There was no error in admitting the testimony of Mrs. Demery. (1 Green. on Ev., sec. 275.) The remarks of the court were not calculated to influence the verdict of the jury.

II. An indictment for an "assault with intent to kill," will support a conviction for "assault with a deadly weapon with intent to inflict a bodily injury." (*Robey's case*, 8 Nev. 312; *People v. Davidson*, 5 Cal. 134; *People v. English*, 30 Id. 217; 22 Wend. 167; 17 Id. 386; 3 Hill, 93; 5 Porter, 523; 7 Id. 475; 5 Ala. 477; *People v. Vanard*, 6 Cal. 563.)

By the Court, LEONARD, J.:

Appellant was indicted for an alleged assault with intent to kill one Hugh Kelly. The result of his trial was a conviction for an assault with a deadly weapon with intent to inflict upon the person of said Kelly a bodily injury. This appeal is from the judgment, and from an order overruling appellant's motion for a new trial.

There was evidence on behalf of the state tending to prove that on the morning of the ninth day of February, 1877, at about eleven o'clock A. M., at Ruby hill, in Eureka county, appellant and one Hugh Kelly became engaged in a controversy which arose in the following manner: Kelly and one Madden, at Smith's saloon, were playing a game of cards, which terminated in a fight. When Kelly was down and being worsted, appellant intervened and took Madden off. Kelly, who had been drinking to some extent, asked appellant, with an oath, whether he wanted any of it. Appellant replied that he did not. Kelly held in his hand a miner's candlestick, with which he violently gesticulated. Appellant picked up a stick and raised it to strike Kelly, but did not deliver the blow. Kelly then turned and walked away to Werry's lodging-house, where he roomed. Appellant dropped his club and immediately went to the same house.

There was also testimony to show that Kelly was a miner

and had come off his shift about one o'clock in the morning; that appellant went up to the upper story of Werry's house, and after pushing in the door of Kelly's room, shot Kelly in the shoulder, producing a serious wound.

Mrs. Kate Demery testified on behalf of the state as follows: "I was present near Smith's house on the morning of the affray between Tickel and Kelly; shortly after, Kelly turned and went to Werry's house, where he lodged; I saw a man give Tickel a pistol; the defendant then started toward Werry's house, after putting the pistol in his pocket, when a man in the crowd, addressing him, called out: 'Come back, Jimmy;' to which Tickel replied: 'Let me alone; I'll fetch him,' and immediately started toward Werry's house; I afterwards heard the shot, and saw Tickel returning up the street."

Upon cross-examination the witness was asked if she recognized a document shown her as her testimony given before L. W. Cromer, justice of the peace, sitting as a committing magistrate in this case, to which she replied that she did. Appellant's counsel then pointed out to the witness the language in the deposition referred to, and asked her if she had not sworn at such examination that a man in the crowd said: "Let him go," and another man said: "Let him go; he'll fetch him." The witness answered: "I never swore so; if so written, it was a mistake."

On re-direct examination, the district attorney asked the witness whether the justice had not made a mistake in taking down her testimony in respect to the person who used the language written in the deposition in regard to which she had been cross-examined.

Appellant's counsel objected to the question upon the ground that parol evidence was not competent to vary or contradict a deposition read over, signed and sworn to by the witness, and also moved the court to strike out the answer to the previous question on the same ground. The court overruled the objection and denied the motion to strike out. Exceptions were taken, and the witness answered as she had done to the preceding question.

The deposition and testimony referred to, properly signed

Opinion of the Court—Leonard, J.

by the witness and certified by the justice, were then put in evidence without objection. This was the testimony of the witness at the preliminary examination, as appears from the deposition: * * * "I was standing at the door of my house at the time the difficulty between Tickel and Kelly occurred; I saw Kelly with a candlestick (to the best of my belief) going backward towards Nick Werry's saloon; a man came out and gave Tickel a shooter; Tickel walked down fast after Kelly; one man said 'Don't let him go;' another said 'Yes, let him go; he'll fetch him;' * * * I did not hear Tickel say anything, but heard some [one] say: 'He'll fetch him.'" On cross-examination it appears that witness stated that she did not hear Tickel say anything at the time Kelly was backing down the street.

L. W. Cromer, the justice before whom the preliminary examination of appellant was had, testified that the testimony of Mrs. Kate Demery, as set forth in the deposition before mentioned, was taken down in his presence by Marshall Attwood, acting as his clerk, and when taken down was read over to the witness, assented to by her as correct, and her mark affixed thereto in his presence, and that he believed the deposition correctly stated the testimony of the witness given before him on appellant's preliminary examination. Attwood testified in effect the same.

The court, of its own motion, asked the last named witness the following question: "Don't you ever make mistakes in taking down testimony in a justice's court?" The witness answered, "It may be possible, your honor, but we try not to." Whereupon the court replied: "Well, if you don't, you are the first justice of the peace I ever heard of who does not make a mistake occasionally."

One of the appellant's counsel then testified that he took full notes of the testimony of Mrs. Demery at the preliminary examination, and he found that his notes, which he produced, corresponded entirely with the deposition returned into court by the justice of the peace.

Appellant made himself a witness at the trial. He admitted shooting Kelly in the hallway leading to his (appellant's) room in Werry's house, but claimed that he acted in

self-defense. He testified that he was a miner, and at the time of the affray was at work on the night shift on Ruby hill; that he had quit work about an hour before the difficulty with Kelly; that he had for two weeks prior to that time roomed at Werry's; that he had not slept at all during the preceding night, and was going to his room for the purpose of going to bed, and for no other purpose; that he had no intention of meeting, seeking or encountering Kelly, or of provoking a fresh quarrel, or continuing the previous one; that he met Kelly in the hallway which lead to appellant's room, and was in the act of passing Kelly, when the latter raised his candlestick and made a stab at him, which he avoided by leaping aside; that Kelly then raised his hand to make another stab at him, when he fired and shot Kelly through the shoulder; that in so doing he was under the belief that it was necessary for him to fire in order to save his life or to protect himself from great bodily harm from Kelly; that he did not shoot Kelly in his room, nor push in the door of the room, but that the whole occurrence happened in the hallway. There was testimony admitted on behalf of appellant that a miner's candlestick was a sharp instrument, capable of inflicting a deadly wound; that to the knowledge of the witnesses, men had been killed by stabs inflicted by such instruments, although they were ordinarily used for the purpose of lighting mines.

The transcript does not contain all the evidence produced on the trial. Four alleged errors are discussed and insisted upon by counsel for appellant: 1. It is urged that the court erred in refusing to strike out the answer of Mrs. Demery, "I never swore so; if so written it was a mistake," given in reply to the question propounded by appellant's counsel on cross-examination whether she did not swear differently at the preliminary examination.

The statute provides that, depositions taken at preliminary examinations as therein required "may be used by either party on the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or when his personal attendance cannot be had in court." When the witnesses are present at the trial, as in this case,

Opinion of the Court—Leonard, J.

depositions may be referred to by counsel for their convenience, and they may be used for the purpose of impeachment in case of discrepancy between testimony given upon the trial and that taken down by the examining magistrate. For the purposes of the trial we know of no other use to which they can be put. For the purpose of discrediting Mrs. Demery, by showing a discrepancy upon a material point between her testimony given at the preliminary examination and on the trial, she was asked a question by appellant's counsel which was susceptible of one of two answers only. She was able to say that she did so testify before the magistrate, or that she did not. Her answer was fully responsive to the question whether true or false, and whether the one or the other, it was not incompetent. It is at least doubtful that appellant had the right to ask the witness as to the contents of the deposition, or as to what she testified at the preliminary examination, the deposition itself being presumptively the best evidence of either fact. (*The Queen's Case*, 2 B. & B. 287; *Newcomb v. Griswold*, 24 N. Y. 298; *Lightfoot v. The People*, 16 Mich. 512; *Gaffney v. The People*, 50 N. Y. 423; 2 Phill. Ev. 962.)

But as was necessary and proper, the deposition was shown to the witness, who had an opportunity to examine the same, and no objection was made to the question asked.

Had the witness answered that she did testify before the magistrate, as stated in the deposition and as asked by counsel, the deposition could not have been introduced in evidence at the trial. "The rule is clear that where a witness admits the statement alleged, no other proof of his having made it, is allowable." (*Lightfoot v. The People supra.*) But inasmuch as she answered that she did not so testify, appellant was required and permitted to introduce the deposition which the law presumes contained all the testimony given by her before the magistrate. Whether or not it would have been competent on the part of the state to rebut the legal presumption of correctness in the deposition, after it was admitted in evidence, or whether appellant was entitled to an instruction to the jury that such deposition was conclusive evidence of the facts testified to before the

magistrate, cannot be decided at this time for the reason that the record does not justify an examination of the proposed questions.

For the purposes of this appeal it is sufficient to say that it was not more incompetent for the witness, on cross-examination, to deny making the statement embodied in the deposition and sent to the trial court, than it would have been to deny making the same statement verbally out of court. The method of proving the discrepancy only would be different in the two cases. And whether or not the court should have ordered the words of the witness, "If so written it was a mistake," stricken out, because not responsive to the question, or for any other reason, had a motion been made to strike out such words alone, is not before us, because that motion was not made. It certainly was not error to refuse to strike out the whole answer of the witness upon the grounds stated. Besides, the conclusion of the witness expressed by the words, "If so written it was a mistake," necessarily followed if her denial of testifying as asked by appellant's counsel was in fact correct; and the expression by her of that opinion or conclusion was entirely harmless. If she had testified before the magistrate as appeared in the deposition, then her words, "If so written it was a mistake," fell of their own weight; and if she had not so testified in fact, then they were inevitably true, whether she expressed them or not. In other words, a simple denial on her part would have performed the same office as was performed by her whole answer.

The question asked by the district attorney, on re-direct examination, whether the justice had not made a mistake in taking down her testimony, was entirely useless, but at any rate it was harmless in its results, because the question and answer were merely a repetition of what had already been stated by the witness on cross-examination by appellant's counsel. The first assignment of error is not well taken.

2. It is next claimed by appellant that the court erred in asking witness Attwood the question: "Don't you ever make mistakes in taking down testimony in a justice's court?" and after the reply of the witness, in remarking in the presence

Opinion of the Court—Leonard, J.

of the jury, "Well, if you don't, you are the first justice of the peace I ever heard of who does not make a mistake occasionally."

It cannot be denied that it was important for the state to maintain the integrity of the witness Demery, and that it was just as important for the defense to impeach her. To accomplish the former, it was necessary for the state to make it appear evident to the jury, that the apparent discrepancy in her testimony was the result of a mistake on the part of the justice, rather than falsehood on the part of the witness. On the other hand, to impeach her credibility it was necessary for appellant to present to the jury the deposition as a document, which was, in fact, what it purported to be. Whether or not appellant had succeeded in showing the witness to be unworthy of belief, was a question to be decided by the jury upon legal proofs admitted without comment or instruction by the court upon questions of fact. It is true the court did not address the jury personally, but it might as well have done so, for no one else had aught to do with the question of fact then before the court, and no one else could have been influenced against appellant, or in favor of the state by the remark. It is entirely natural that jurors do, and proper that they should, listen attentively to, and be greatly influenced by, all remarks of the court. They have the right to confide in its expressed opinions, and it is their duty to obey its legal instructions. It may be said that jurors are presumed to know the law, that the court has not the right to instruct them or give its opinions upon questions of fact, and that, therefore, they ought not to be, and will not be, influenced thereby. In my opinion experience does not justify such conclusion; but at any rate, courts cannot presume against the natural result of remarks or instructions improperly made. If the court in this case had informed the jury that it had no right to comment or instruct them upon questions of fact, and that they must not be influenced by what it might say, still its expressed opinion must have influenced them. They would have known the opinion of the court then as now, and it would have left its impression upon

Opinion of the Court—Leonard, J.

their minds, however hard they might have tried to escape it. Appellant had the right to try to impeach the witness Demery, and the further right to have any evidence admitted for or against that effort, to go to the jury unaffected by the court's opinion. On the contrary, the jury were told in this case, upon a material issue, that justices of the peace were not only liable to make mistakes like the rest of mankind, but that, to the knowledge of the court they did so make them. The language used naturally conveyed to the minds of the jury the impression at least, if not the conviction, that they were justified in looking at the returns of justices in criminal cases with suspicion. But, worse than all, the court's words naturally left the impression upon the minds of the jury that because other justices had made mistakes, to the knowledge of the judge, therefore Justice Cromer might have made a mistake in this case. The inference was far-fetched and unjustifiable. It is enough for any man to sustain the consequences of his own mistakes, without being made responsible for those of his entire guild.

In *The People v. Bonds*, 1 Nev. 36, the court say: "There is nothing in the point made by respondent's counsel that this was not a formal instruction, but merely a remark made to counsel. Such a remark, made by the presiding judge in the hearing of the jury, would have precisely the same effect as if given as a formal instruction."

In *The State v. Ah Tong*, 7 Nev. 152, it is said: "Under our practice the judge should intimate no opinion upon the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo; and the effect of such an opinion cannot be obviated by announcing in distinct terms the jury's independency of him in all matters of fact." (2 Winston, 47.) One object is stated to be to guard against the well known proneness of jurors to seek to ascertain the opinion of the judge and to shift their responsibilities from themselves to the court.

In *The State v. Harkin*, 7 Nev. 381, the trial court, in overruling an objection to certain testimony, remarked in the presence of the jury, "that there was as much testimony that defendant had kicked deceased upon the chest

Opinion of the Court—Leonard, J.

as upon the face." After the testimony was all in, and before the argument of counsel, the court informed the jury that in making the remark above stated it was simply ruling upon the objection as it was made; that the court did not wish it understood as saying how much or how little testimony there was upon any particular point; that the whole matter was for the jury to pass upon, and that they would observe for themselves what the testimony was. But the court did not retract its opinion formerly expressed. The remarks in that case, as in this, were not delivered directly to the jury, as though an oral charge was being delivered to them, but the court then spoke and acted more directly to the counsel for defendant, while in this case the court directly addressed the witness alone. Whether counsel or witness was addressed, and not the jury, is a matter of no consequence. The effect upon the jury was the same. In the *Harkin* case this court said: "It is evident that the opinion of the court can be as effectually conveyed to the jury by expressing it in their hearing, while ruling upon an objection to evidence, as by embodying it in what purports to be a declaration of the law for their instruction. Accordingly, and we think correctly, it has been held that the judge has no more right to volunteer before the jury his opinion upon a material fact in controversy while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. * * * The right to a decision on the facts by a jury uninfluenced and unbiased by the opinion of the judge, has been deemed worthy of a constitutional guarantee. It cannot be lawfully denied by the simple evasion of looking at the jury, or foisting the opinion into a ruling upon the testimony.

In *McMinn v. Whelan*, 27 Cal. 319, a civil case, the lower court expressed its opinion upon the respectability of a witness under examination, and the appellate court said: "We should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing were thus indorsed."

In our opinion the remarks complained of were in sub-

stance and effect an instruction to the jury upon questions of fact, and that they were made in violation of one of appellant's constitutional rights.

3. The remaining assignments of error relied upon are the giving of the ninth instruction by the court, and the refusal to give the third instruction asked by appellant. By the third instruction given by the court, the jury were told that if appellant acted in self-defense he should be acquitted. By the eighth they were instructed that they were to judge whether or not, at or immediately preceding the moment of shooting, appellant was in fear of losing his life or receiving bodily injury from Kelly, and reasonably thought a miner's candlestick was a deadly weapon, and that Kelly intended to kill him or inflict upon him a bodily injury; that if they so thought, the plea of self-defense could be considered by them. The ninth instruction, of which complaint is made, reads as follows: "In considering the plea of self-defense it is the duty of the jurors to carefully scrutinize all the testimony, and not to be misled by apparent and not real facts, or inferences to be drawn from such facts."

It is claimed by appellant that by the instruction quoted, the jurors' minds were directed against the defense alone; that by it there was an intimation that the defense had been made upon apparent but not real facts; in other words, that appellant's testimony, and that given in his behalf, was not what it purported to be—that it was false. It should be borne in mind that there was testimony both for and against appellant's claim of self-defense. In fact, the only real issue in the case was whether or not the shooting, which was admitted, was done in self-defense. Such being the case, when the court used the words, "In considering the plea of self-defense," etc., it was the same as saying, "In considering this case," etc. We do not think the jury could have understood the court as intimating that the defense had introduced evidence of facts that were apparently so, but really were not as claimed. Inasmuch as the evidence was very conflicting upon the question of self-defense—the only one in the case—it is evident that there was, on one side or the other, what the court was pleased to call

Points decided.

apparent, but not real facts. The jury were, therefore, told that in considering the plea of self-defense—that is, in considering whether or not appellant was guilty, it was their duty to carefully scrutinize all the testimony in the case, and not to be misled by apparent, but not real facts. We do not think the jury could have been misled by the instruction.

The court did not err in refusing the third instruction asked by appellant. As presented it might have misled the jury. From it they might have gathered the idea, that “malice or deliberate purpose on the part of the defendant” was a necessary element of the crime of assault with intent to kill, which is not the fact. (*State v. O'Connor*, 11 Nev. 424.) In the form presented the instruction was inapplicable to the case.

If appellant went to his room under the circumstances stated in the instruction refused, it would have been entirely proper to have informed the jury that his going there was not evidence against his claim of self-defense. Had such an instruction been asked it would doubtless have been given, particularly in view of the court’s sixth instruction. The judgment is reversed and the cause remanded for a new trial. .

[No. 875.]

W. E. TERRY ET AL., RESPONDENTS, v. GEO. G. BERRY
ET AL., APPELLANTS.

JUDGMENT—FORM OR SUBSTANCE—RES ADJUDICATA.—A judgment should always be tested by its substance rather than its form. (HAWLEY, J.) Judgment in *Humboldt M. M. Co. v. Terry*, 11 Nev. 237: *Held*, to be *res judicata* as to the plaintiffs in that suit and all parties claiming under them.

DEED FROM TOWN-SITE TRUSTEE—SUFFICIENCY OF.—The facts authorizing the grantees to receive a deed from the trustee need not be recited in the deed. A bargain and sale-deed in the usual form, reciting a consideration of one dollar is sufficient to convey the title to the land, and is *prima facie* evidence that it was delivered to the party intended to receive it.

STATEMENT NOT CONTAINING ALL THE EVIDENCE—FINDINGS OF FACT.—Where the statement fails to show that it contains all the evidence the appellate court will presume that there was sufficient evidence at the trial to sustain the findings of the court.

Statement of Facts.

DEED—PAROL EVIDENCE ADMISSIBLE TO EXPLAIN.—It is admissible to prove by parol that land sold under execution was situated in township thirty-six instead of township thirty, as described in the sheriff's deed.

IDEM—REFERENCES AND MONUMENTS.—The references and monuments contained in the deed, in the event of any discrepancy or mistake, control the other parts of the description.

HOMESTEAD—PARTNERSHIP PROPERTY.—A homestead cannot be carved out of land held and claimed by parties as copartners.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The court below found, among other facts, that Ginaca & Gintz were partners from 1868 up to January, 1875, engaged in business at Mill City and Winnemucca in Humboldt county; "that on the twelfth day of November, 1874, Geo. G. Berry, as trustee of the town site of Winnemucca, having received from the said Ginaca & Gintz the sum of four hundred dollars, in payment for the premises hereinafter described, together with a description of said premises then in possession of the said Ginaca & Gintz, and which had been in their possession, and in possession of their grantors, since 1867, by a deed granted, bargained, sold and conveyed to the said Ginaca & Gintz" the land described in plaintiff's complaint; that on the seventh day of January, 1875, the said Ginaca & Gintz conveyed said premises to the Humboldt M. & M. Co.; that it entered into the possession of said premises with said Ginaca as its managing agent "up to, on, or about the twenty-sixth of June, 1875, when the said Ginaca, with his wife and children, moved to the city of San Francisco, California, where they do now and have ever since resided;" that after Ginaca left said premises, G. G. Berry, as president, superintendent, or general manager of said Humboldt M. & M. Co., entered into the possession of said premises, "and is now and was, and for several months prior to the commencement of this action had been" residing on said premises; "that the said Ginaca & Gintz, as copartners, since they became the possessors and owners of said premises, have erected thereon several buildings which were used and occupied by their employees up to the time of their conveyance to said Humboldt Mill

Argument for Appellants.

and Mining Company;" "that the plaintiffs in this suit, on or about the fifteenth day of April, 1874, obtained judgment in this court against the said Ginaca & Gintz, which judgment on the same day was properly entered in the docket kept by the clerk of this court; and that within two years from the docket of said judgment an execution was duly issued, and all of the interest that the said Ginaca & Gintz had at the date of the docketing of said judgment, or subsequently acquired in and to the above-described premises, was sold by virtue of said execution, and the plaintiffs in this suit became the purchasers; and more than six months after the sale of said premises, no redemption having been made, said plaintiffs received from the sheriff of said county a deed for said premises; that some time in July, 1875, Mrs. Ginaca, while residing in San Francisco, subscribed and swore to a notice of a homestead claim to a portion of the premises above-described; and that said notice was properly recorded in the records of said county; and that defendant Berry, at the commencement of this action, was residing in said homestead claim as the tenant of Mrs. Ginaca; that all of the homestead claim consists of real property owned jointly by the said Ginaca & Gintz as cotenants, or tenants in common, and was purchased and improved by the money belonging to the partnership firm of Ginaca & Gintz; and that at the date of said homestead claim the said Ginaca and his wife were, and have ever since continued to reside, in the city of San Francisco."

M. S. Bonnifield, and George G. Berry for Appellants.

I. The court erred in holding that the statement and affidavit of Ginaca & Gintz, authorizing a judgment to be entered against them and in favor of Friend, Terry & Doan without the indorsement thereon of "judgment" by the clerk, constituted a judgment. (*Hahn v. Kelly*, 34 Cal. 392.) An inspection of the judgment-roll contradicts the entry made in the judgment-book which was relied upon to sustain the judgment in 11 Nev. 237. If there was no judgment in the record there could be no valid lien upon the property of Ginaca & Gintz, and the entry of a judgment in the

Argument for Appellants.

docket by the clerk was a mere nullity, and could not bind the property of Ginaca & Gintz, or their grantee, who purchased for a valuable consideration.

II. The court erred in admitting in evidence the deed from the town-site trustee to Ginaca & Gintz. The recitals in the deed wholly failed to show that they were occupants, or in possession or entitled to the occupancy or possession of any part of the land, or that they either in person or by their agent or attorney, signed a statement in writing containing a correct description of the particular parcel or parts in which they claimed to be entitled to receive a deed, and delivered the same to the district judge. (Comp. L. sec. 3859.) A deed given to one not an occupant is void. (*Treadway v. Wilder*, 8 Nev. 98; 9 Nev. 91. The sheriff's deed does not recite nor does it show *aliunde* that the plaintiff produced a copy of the judgment. (*Wilcoxson v. Miller*, 49 Cal. 194.)

III. The court erred in admitting parol evidence to show that the lands described in the sheriff's deed to plaintiff as being in section twenty, township thirty, north range thirty-eight east, were situated in another and different township. There was no ambiguity in the description of the property as given in the deed. (*Ruhling v. Hackett*, 1 Nev. 360; *Quivey v. Baker*, 37 Cal. 468; Phillips on Evid. sec. 645; *Cameron v. Irwin*, 5 Hill. 272; *Chapin v. Clemitsen*, 1 Barb. 311; *De Reimer v. Cantillon*, 4 Johns. Ch. 85; *Quivey v. Baker*, 37 Cal. 468.) A deed which fits equally well different parcels of land is void for uncertainty. (*Mesick v. Sunderland*, 6 Cal. 297; *Keane v. Canovan*, 21 Cal. 291; Wells on Law and Fact, sec. 145.)

IV. The court erred in holding the property claimed by Mrs. Ginaca as a homestead to be partnership property. If it be true that Ginaca & Gintz were partners in all the lands claimed by them under a possessory right, before the deed from the trustee, that fact alone is not sufficient to fix and determine their interest in the property under the new title.

V. At the date of the deed from the trustee the premises, described in the declaration of homestead made by Martha

Argument for Respondent.

Ginaca, was occupied by herself, husband and family, and used as a family residence with all the characteristics of a homestead. Martha Ginaca was an occupant of a part of the public domain within the boundaries of the town-site of Winnemucca, and had a complete right to make application to the trustee for a deed for the premises so occupied by her. It is shown by the declarations of both Ginaca and Gintz that Gintz at no time claimed an interest in the homestead property, and no presumption will arise from a general copartnership which would overthrow his declarations accompanied with acts. Declarations made by a party in possession are always admissible against himself, and all persons holding under him, as to the extent of his estate or interest in property held in common with another. (*Canon v. Stockman*, 36 Cal. 535; *McFadden v. Wallace*, 38 Id. 51.)

VI. No presumptions of abandonment of the homestead will arise from the fact that Mrs. Ginaca has since been absent from the state. (Comp. Laws, 187.)

J. B. Marshall, for Respondent.

I. The trustee's deed to Ginaca & Gintz is for the consideration of one dollar; this is sufficient to support a conveyance of land. (*Ocheltree v. McClung*, 7 W. Vir. 232.) It is a good and sufficient deed to convey the fee-simple, which is all the statute requires. (4 Kent. Com. 462; *Chiles v. Conley's Heirs*, 2 Dana, 22.) The deed is the evidence of the trustee's judgment in the adjudication of the rights of Ginaca & Gintz. (*Tecumseh Town-site Case*, 3 Neb. 276.) If the trustee conveys to the claimant before the expiration of the six months, and without receiving the statement described in Section 4 (2 Comp. Laws, 3859), the object of the statute has been accomplished, and the fact that the trustee waived the service of the statement, and executed the conveyance to the claimants cannot vindicate the deed, when no other claimant applied for the premises. If the deed was obtained through fraud, it can only be declared void by a court of equity. (51 Cal. 158.)

II. The description in the deed from the sheriff to the

Argument for Respondent.

plaintiff was sufficient. The fact that the number of the section was not inserted in the deeds makes no difference, as the descriptions otherwise appearing in the deeds are sufficiently certain to designate the land intended to be conveyed. (*Doe v. Roe*, 30 Georgia, 553; *Bybee v. Hageman*, 66 Ill. 519; 67 Id. 489, 581; *Beal v. Blair et al.*, 33 Iowa, 319; *Jackson v. Perrine*, 35 N. J. Law R. 137; *Lawrence v. Davidson*, 44 Cal. 177; 4 Kent's Commentaries, 467, and Note C.; *Smith v. Chatham*, 14 Texas, 322; *Wade v. Deray*, 50 Cal. 376.) If a deed recites two descriptions of the property conveyed, one of which sufficiently identifies the property, while the other is false, in fact, the false description should be rejected as surplusage. (*Reed v. Spicer*, 27 Cal. 57; *Vanse v. Fore*, 24 Id. 435; *Kimball v. Semple*, 25 Id. 440; *Haley v. Amestoy*, 44 Id. 132; *Piper v. True*, 36 Id. 606; *Walsh v. Hill*, 38 Id. 481; *Lawrence v. Davidson*, 44 Id. 177; *Wade v. Deray*, 50 Id. 376; *Doe v. Roe*, 30 Georgia R. 553; *Bybee v. Hageman*, 66 Ill. 519; 67 Id. 489; 67 Id. 581; *Beal v. Blair et al.*, 33 Iowa, 319; *Jackson v. Perrin*, 35 New Jersey Law R. 137; *Smith v. Chatham*, 14 Texas, 322.) Parol or extrinsic evidence is always admissible to explain the calls of a deed for the purposes of their application to the subject-matter, and thus give effect to the deed. (*Altschul v. S. F. C. P. H. A.*, 43 Cal. 173; *Romer v. Nesmith*, 34 Id. 624.) When the sheriff's deed described the land as in T. 32 W. R. 9 E., without stating in what county or state situated, held to be a latent ambiguity. (*Billings v. Kankakee Coal Co.*, 67 Ill. 489; see 50 Cal. 376.)

III. To impress the character of homestead upon the premises, the party claiming the homestead must be actually residing thereon at the time the declaration of homestead is filed. (*Prescott v. Prescott*, 45 Cal. 58.) A homestead cannot be carved out of lands held in joint-tenancy, or by tenancy in common, as the statute has provided no mode for their separation or ascertainment. (*Seaton v. Son*, 32 Cal. 483.) One partner cannot, by deed or otherwise, convey or dispose of partnership property, so as to enable one partner to hold a homestead on partnership property and prevent creditors from selling it in payment of their debts. (*Bishop v. Hubbard*, 23 Cal. 514.)

By the Court, HAWLEY, C. J.:

This is an action of ejectment to recover ninety-nine and ninety one hundredths acres of land in the town of Winnemucca upon which are situate the buildings known as the "Humboldt Reduction Works." The plaintiffs claim the property by virtue of a sheriff's deed, they having purchased said premises at sheriff's sale under an execution issued upon a judgment by confession in favor of said plaintiff and against J. Ginaca and A. Gintz, obtained on the fourteenth day of April, 1874.

The title of Ginaca & Gintz to the land in controversy was derived by virtue of a sheriff's deed under an execution sale in the suit of A. D. Splivalo against the Humboldt Canal Company, which claimed this and other lands by virtue of an act of congress, entitled "An act to grant the right of way to the Humboldt Canal Company through the public lands of the United States," approved June 12, 1866. (14 U. S. Stat. 64.) Ginaca & Gintz also claimed title in fee-simple to the premises by virtue of a deed executed by the trustee of the town-site of Winnemucca, on the fourteenth day of November, A. D. 1874.

The defendant Van Lennep was, at the time of the commencement of the suit, in the possession of a portion of the premises as the superintendent and servant of the Humboldt Mill and Mining Company, a corporation claiming title to the land by virtue of a deed executed by Ginaca & Gintz on the seventh day of January, A. D. 1875. The defendant Berry was in the possession of a portion of said premises as lessee of Martha Ginaca, wife of J. Ginaca, who claimed the same by virtue of her declaration of homestead recorded on the twenty-seventh day of July, A. D. 1875.

The cause was tried before the court without a jury. The court found in favor of plaintiffs. The defendants appeal from the judgment and from an order of the court refusing a new trial. We shall endeavor, without attempting to follow counsel in each of the thirty-seven specific points set forth in appellants' brief, to notice all the material questions presented by the record.

1. The validity of the judgment by confession, entered April 14, 1874, was sustained by this court in *The Humboldt M. & M. Co. v. Terry et al.*, 11 Nev. 237.

It is, however, contended by appellants that that case is not conclusive of the validity of said judgment, because the judgment-roll was not then before the supreme court. In the statement in this case the judgment-roll is presented, and it is now argued that the judgment is invalid because the words "judgment entered" are not indorsed on the statement and affidavit contained in the judgment-roll.

The indorsement after the title of the suit is as follows: "Statement of judgment by confession. Filed April 14, A. D. 1874. J. H. Job, clerk. Entered in book 'B' of judgments, pages 29 and 30, April 14, A. D. 1874. Attest: J. H. Job, clerk." The objection to the indorsement, like the objection to the judgment, reaches only the form, and does not touch the substance.

If the opinion in 11 Nev. is correct, and of its correctness I entertain no doubt, then it follows that the objections now made are without merit, for the indorsement does show that the "judgment by confession" was "entered" April 14, A. D. 1874, in book "B" of judgments. The opinion of this court, in 11 Nev. is conclusive upon the subject that "a judgment should always be tested by its substance rather than its form." In order to make the record of the judgment valid upon its face it is only necessary, as was said by the supreme court of the United States in *Maxwell v. Stewart*, 22 Wall. 79, for it to appear "that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. All else is form only."

The same reasoning applies with as much force to the judgment-roll as to the judgment. In this case the judgment-roll, as well as the judgment entered in the judgment book, does affirmatively show jurisdiction over the parties and of the subject-matter. It would, of course, be better if clerks would always conform to the usual and approved forms of entering judgments and making up judgment-rolls. The statutory provisions are not to be ignored. But there

Opinion of the Court—Hawley, C. J.

are many mistakes, omissions and ambiguities, which the law overlooks as long, and only as long, as they do not affect the substance of the record.

There are several very respectable authorities which go further than it is necessary for us to go in this case, and hold that the existence of a correct judgment-roll is not absolutely essential to the validity of a judgment; that the judgment itself is always admissible to prove that a judgment was in fact entered, and that the omission of the clerk to make a correct copy of the judgment, and to properly annex the papers belonging to the judgment-roll, would not render the subsequent proceedings void. (*Williams v. McGrade*, 14 Minn. 48; *Lick v. Stockdale*, 18 Cal. 223; *Sharp v. Lumley*, 34 Cal. 614; *Galpin v. Page*, 1 Saw. 336.) The testimony of the witness La Grave that in his opinion the word "judgment" was not in the handwriting of the clerk, was insufficient and incompetent to establish any fraud in the entry of the judgment.

2. The court did not err in admitting in evidence the deed from the townsite trustee for the purpose of showing that the government title to the land in controversy had been conveyed to Ginaca & Gintz. The law does not demand that the facts authorizing the grantees to receive the deed from the trustees shall be recited in the deed. The statute makes it the duty of the trustee to convey the property "by a good and sufficient deed of conveyance" to the person or persons entitled to receive it. (2 Comp. L. sec. 3857.) The deed executed by the trustee is a bargain and sale deed in the usual form, reciting a consideration of one dollar, and is certainly sufficient to convey the title to the land. The deed was *prima facie* evidence that it was delivered to the persons entitled to receive it.

In *Sherry v. Sampson*, the court say: "When the probate judge has made a deed for any portion of said land to any person it will be presumed in the absence of anything to the contrary that he has made the deed to the proper person." (11 Kan. 615.) But even if it were necessary for the plaintiffs to show by evidence *aliunde* that they were entitled to the deed, we are not called upon, by the record before us,

to decide whether the evidence was sufficient to authorize the trustee to execute the deed because the statement on motion for a new trial fails to state that it contains all the evidence, and we are therefore bound to presume that all the facts necessary to sustain the findings of the court upon this point were properly proven.

It is true that the judge, in his certificate, states as a "fact that said statement contains all the evidence in said cause." But this is not sufficient. The statute only requires the judge to certify that the statement "has been allowed by him, and is correct" (1 Comp. L. 1258, 1396), and, as was intimated in *Caples v. The C. P. R. Co.*, 6 Nev. 271, the certificate of the judge covers nothing more than is required by the statute.

3. The conclusions reached as to the admissibility of the deed from the townsite trustee, and of its sufficiency to convey the government title, renders it unnecessary to consider any of the points made by appellants with reference to the admissibility of the deed from Splivalo to Ginaca & Gintz.

4. The court did not err in admitting parol evidence to show that the land sold by the sheriff, under the execution issued upon the judgment by confession against Ginaca & Gintz, was in township thirty-six, as alleged in the complaint, instead of township thirty, as described in the sheriff's deed. The deed from the townsite trustee to Ginaca & Gintz properly described the land as being in township thirty-six. The sheriff, in the notice of sale, certificate of sale, and in his deed, erroneously described the land as being in township thirty.

The full description given in the sheriff's deed reads as follows: "Those certain lots, pieces and parcels of land and property situate, lying and being in Humboldt county, Nevada, and bounded and particularly described as follows, to wit: Commencing at a post at the north-east corner of the south-west quarter of section 20 of township 30 N., R. 38° E., Mount Diablo base and meridian, running west to center of Humboldt river, following said river to the junction of T. Lay and J. M. Barrett's land (or the land formerly owned by them); thence running south, 47° 15' E., to a post

Opinion of the Court—Hawley, C. J.

at the corner of George Barrett's land (or the land formerly owned by him); thence running with a curve of the Humboldt canal, at a distance of 60 feet north of the center of said canal, to the south-east corner of lot No. 4, block 29; thence east to a post at the south-east corner of said south-west quarter of said section 20; thence running directly to the point of beginning; with that certain quartz-mill known as the 'Humboldt Reduction Works,' and all buildings and improvements located on, or belonging to, said land; said parcel of land containing ninety-nine and ninety one-hundredths acres, as appears on the map filed in the office of the recorder of Humboldt county, Nevada." It is apparent from this description that it was the intention of the grantor to convey ninety-nine and ninety hundredths acres of land, with the quartz-mill known as the Humboldt Reduction Works.

The parol evidence shows that the Humboldt Reduction Works are situate in township 36. Taking the description as given in the deed, with all its references, there can be no question as to the land actually intended to be conveyed. The description of the land would have been good if the township had not been specified. The references and the monuments specified in the deed control the other parts of the description, and, in the event of any discrepancy or mistake, are to be taken instead of the designation of the land as being situate in any named township. (*Loomis v. Jackson*, 19 John. 448; *Tenny v. Beard*, 5 N. H. 61; *Berry v. Wright*, 14 Tex. 273; *Everett v. Boardman*, 58 Ill. 430.)

It was the duty of the court to admit the parol evidence in order to ascertain the correct description of the land (not to vary or contradict the terms of the instrument), and to reject that portion of the description which was shown to be false. (*Thompson v. Jones*, 4 Wis. 110; *Seaman v. Hogeboom*, 21 Barb. 406; *Raymond v. Coffee*, 5 Oregon, 134; *Bybee v. Hageman*, 66 Ill. 521; *Reed v. Spicer*, 27 Cal. 57; *Piper v. True*, 36 Id. 619; *Haley v. Amestoy*, 44 Id. 132.)

5. With reference to the homestead claim asserted by Mrs. Ginaca, and relied upon by appellant Berry, it is sufficient to state that, in our opinion, the testimony clearly

Opinion of Beatty, J., concurring.

shows that the land was claimed and held by Ginaca and Gintz as copartners. If, however, there was any doubt upon this point, it would be our duty, inasmuch as the statement on motion for a new trial does not purport to contain all the evidence, to presume that there was ample testimony to establish this relation.

The declarations of Ginaca were admissible to show that he and Gintz were copartners in the property claimed by Mrs. Ginaca as a homestead prior to the time of the execution of the deed by the town site trustee. Such declarations would not be conclusive that such partnership continued after the execution of said deed, but would make it incumbent upon the defendants to show that thereafter the property was not claimed or held in the same relation.

The doctrine is well settled in California that a homestead cannot be carved out of land held in joint-tenancy or tenancy in common. (*Seaton v. Son*, 32 Cal. 483, and authorities there cited.)

The judgment of the district court is affirmed.

BEATTY, J., concurring:

In the case of *Humboldt Mill and Mining Company v. Terry et al.* (11 Nev. 237), I expressed the opinion (which is only confirmed by the fuller presentation of the facts made in this case) that there never was any judgment in favor of these plaintiffs upon the confession of Ginaca & Gintz, and consequently that the plaintiff in that action acquired the title of Ginaca & Gintz free from any lien in favor of these plaintiffs. The court, however, determined otherwise, and the question cannot be again raised by the Humboldt Mill and Mining company, or those claiming under them. As to them the matter is *res judicata*.

If, therefore, Ginaca & Gintz conveyed to that corporation a perfect title to the premises in controversy, subject only to the lien of these plaintiffs, and if they have purchased the premises under execution issued upon their judgment, there is an end of the case, for no one who is in a position to question the correctness of the former decision of this court can have any valid claim thereto.

Argument for Appellants.

On both these points the findings of the district court are conclusive, and as there is no statement of the case which purports to contain all the evidence, the correctness of the findings cannot be questioned.

It appears therefrom that Ginaca & Gintz, as partners, occupied the land and acquired the government title thereto from the trustee of the town site of Winnemucca, while the judgment of plaintiffs constituted a lien upon all their real estate in Humboldt county.

They conveyed the property to the Humboldt Mill and Mining company subject to the lien. After it had been so conveyed, Mrs. Ginaca filed a declaration of homestead, but this was totally invalid, for two reasons: First, the land was the partnership property of Ginaca & Gintz; and, second, at the time of making and filing her declaration she had removed from the state and has never since returned.

Upon the other points discussed I concur in the opinion of the chief justice, and I concur in the order of affirmance.

[No. 915.]

**Z. PIERCE ET AL., APPELLANTS, v. P. L. TRAYER
ET AL., RESPONDENTS.**

DEED—WHEN DECLARED A MORTGAGE VALUE OF PROPERTY.—The mere fact that property was conveyed for less than its real value is not, of itself, sufficient to authorize the court to declare a deed absolute upon its face to be a mortgage.

IDEM—TESTIMONY MUST BE CLEAR.—The proof necessary to show a deed absolute, upon its face, to be a mortgage, must be clear, convincing and satisfactory. Testimony reviewed and held insufficient to sustain the judgment.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts sufficiently appear in the opinion.

M. A. Murphy and Wells & Stewart, for Appellants.

I. The court below erred in permitting defendant to attempt to prove fraud by witness Pierce, as it was not alleged

in the answer. (*Maynard v. F. F. Ins. Co.*, 34 Cal. 48, and cases cited.)

II. The court erred in permitting defendants to amend their answer, after the trial, argument and submission of the case. (*Gillam v. Sigman*, 29 Cal. 637; *McMinn v. O'Connor*, 27 Id. 238; *Stringer v. Davis*, 30 Id. 318.) The evidence is insufficient to justify the findings and judgment of the court, and they are against law. (8 Cal. 574; 10 Id. 446; 1 Id. 133; 13 Id. 60; 7 Id. 150; 27 Id. 232; 12 Id. 27; 14 Id. 167; 9 Id. 177; 15 Id. 504; 32 Id. 102; 18 Id. 394.)

T. W. W. Davies, for Respondents.

By the Court, HAWLEY, C. J.:

The important question in this case is whether or not the testimony is sufficient to sustain the judgment appealed from. On the eleventh day of December, 1876, John A. McDonald executed and delivered to the plaintiffs a deed conveying the real estate, the title to which is sought to be quieted by this action.

The answer of defendants alleges that although the deed was in form absolute yet the fact is that it was, when made and recorded, intended by the parties to be a mortgage to secure the payment of one hundred and fifty-five dollars and five cents. In an amendment to the answer, made after the admission of certain testimony, it is alleged "that said conveyance was made by said McDonald with the intent to hinder, delay and defraud his creditors, P. L. Traver and Sanderson & Horn, and that said conveyance was accepted by * * Pierce & Vernon with full knowledge of the intent of said McDonald."

The court, before which the cause was tried without a jury, found that the deed was intended as a mortgage to secure the sum of one hundred and fifty-five dollars and five cents, and rendered a judgment declaring "that the legal title to the premises" is in John McDonald; that the sale to plaintiffs was a mortgage, and that defendant Traver should be "permitted to sell the premises" to satisfy his judgment against McDonald, "subject to the lien of the mortgage" in favor of plaintiffs.

Opinion of the Court—Hawley, C. J.

It is evident from the findings and judgment that the court did not consider the evidence sufficient to establish the fact of fraud as alleged in the amendment to the answer. If the sale of the property by McDonald to Pierce and Vernon was made with intent to hinder, delay and defraud the creditors of McDonald, and Pierce and Vernon had knowledge of that fact, then the sale was absolutely null and void, and the deed could not, for such reasons, be declared a mortgage.

The court found that McDonald executed the deed upon consideration "that the plaintiffs in this action should cancel all the indebtedness standing on their books against him, which amounted to twenty-eight dollars and fifty cents," and for the further consideration "that plaintiffs should assume to pay to Messrs. Sanderson & Horn the sum of one hundred and twenty-seven dollars." This finding is fully sustained by the evidence. There is no evidence to the contrary.

The plaintiff Pierce, in testifying in regard to the transaction, on cross-examination, said: "McDonald came into our store on the eleventh of December, 1876, and wanted to borrow money; I told him I had no money to loan; he said he owed Sanderson & Horn of San Francisco, and he wanted to raise money to pay them, and if I would let him have the money he would give me a mortgage on his house and lot; I told him I did not want any mortgage, as we had no money to loan; I knew that McDonald was not doing any business and he could not pay me; I told him he could borrow the money from some one else; he went out and was gone for some time; when he returned he said he could not borrow the money; he then told me he would sell me his house; we agreed upon the price, which was, that I was to pay Sanderson & Horn's bill—one hundred and twenty-seven dollars—and square him on our books, which we agreed to do; I have paid Sanderson & Horn their money; * * * at the time McDonald sold me the property he first wanted to borrow the money and give me a mortgage on the property; I told him I would not have anything to do with the property without it would be a *bona*

fide sale, and if he wanted to buy the property back he would have to depend entirely upon me for that." This testimony is uncontradicted. The testimony offered by defendants corroborates it in every particular. McDonald, who was sworn and examined as a witness on behalf of the defendants, details the facts substantially as related by the plaintiff Pierce. He said that prior to the execution of the deed he "tried to borrow the money from other parties, but could not get it." In his cross-examination he said: "When I spoke to Pierce about selling my property to him, I asked him how it would be in case I should want to buy this property back. He said: 'If you want to buy this property back you must depend upon me for that, or leave that to me.'" In the course of his testimony he says: "I never had any understanding with Pierce & Vernon about re-deeding the property back to me. There was no such agreement."

After the deed was executed and delivered the plaintiffs gave McDonald a written lease of the premises for forty dollars per month. McDonald, however, never paid but eighteen dollars. After the sale the defendant Traver and McDonald agreed upon a settlement. Traver in his testimony says: "I was to pay Pierce & Vernon two hundred and forty-five dollars and seven cents in money, give McDonald up his note and cancel our book accounts against him, which amounted to thirty-five or thirty-seven dollars, if Pierce and Vernon would deed the property to me; I went and saw Pierce and he told me he would deed the property to me if I would pay him two hundred and forty-five dollars and seven cents."

There is a conflict of evidence as to the terms of this agreement, whether Traver was also to purchase McDonald's personal property. Pierce testifies that he agreed to sell the premises for two hundred and forty-five dollars and seven cents, the amount of their bill against the property, if Traver would purchase the personal property of McDonald and give up McDonald's note. In explanation of this Pierce says: "I told McDonald I would deed the property to Traver, or anybody else that would buy his per-

Opinion of the Court—Hawley, C. J.

sonal property and pay us our bill of two hundred and forty-five dollars and seven cents; I was doing this to help McDonald sell his personal property—trying to befriend him.”

The proposed agreement was never executed. Pierce & Vernon subsequently bought the personal property of McDonald and took possession of the premises in controversy. Pierce & Vernon cannot be bound by the declarations of McDonald to Traver, to the effect that he only sold the property to Pierce & Vernon to prevent his San Francisco creditors from forcing him, and that he intended to redeem it, said declarations having been made after the sale of the premises. There is testimony tending to show that the price paid by Pierce & Vernon was not a good consideration for the real estate. There is a conflict as to the value of the property. The testimony, however, clearly shows that it was sold for less than its true value.

The mere fact that the property was conveyed for a less sum than its real value is not of itself sufficient to authorize the court to declare a deed absolute upon its face to be a mortgage. A man in embarrassed circumstances may often be compelled, by the laudable desire to pay his debts, to dispose of his property, honestly, for much less than its true value.

The testimony in this case, without conflict, shows that McDonald was unable to procure a loan for the amount necessary to pay the debt due to Sanderson & Horn by giving a mortgage upon the premises as security. McDonald testifies that prior to the sale to Pierce & Vernon he tried to sell the premises to Traver, but could not induce him to buy the same. The remarks made by the court in *Bingham v. Thompson* apply, with equal force, to the facts of this case: “The evidence with respect to the real value of the land at the time of the conveyance favors the proposition that the deed was not intended as an absolute conveyance, but it also very clearly appears that the real value could not be realized by the plaintiff at the time she executed the conveyance and needed the money.” (4 Nev. 237.) There are some other facts of minor importance tending, in some

Opinion of the Court—Hawley, C. J.

slight degree, to show that the sale was not, as the deed purports, absolute.

After giving due weight to all the testimony contained in the record, we have arrived at the conclusion that it is insufficient to sustain the judgment of the court. It is a well-settled principle that the proof necessary to show a deed, absolute upon its face, to be a mortgage, must be clear, convincing and satisfactory. We agree with the opinion of the court in *Bingham v. Thompson*, that the "consideration and weight which the courts so universally give to solemnly executed instruments conveying the title to real property, should not be overcome by an appeal *ad misericordiam*, or the bare cry of fraud. Proof so cogent, weighty and convincing as to leave no doubt upon the mind ought alone to overcome them." (4 Nev. 240.)

The judgment of the district court is reversed and the cause remanded for a new trial.

INDEX.

ABANDONMENT.

ABANDONMENT OF MINING CLAIMS. (See Mining Claims, 10, 12.) 443

ACCESSORY.

PRINCIPAL OR ACCESSORY BEFORE THE FACT. (See Criminal Law, 9, 11.) 386.

ACKNOWLEDGMENT.

1. **ACKNOWLEDGMENT, FORM OF.**—The law does not require that the exact form of the certificate given in the statute shall be followed. A substantial compliance therewith is sufficient. *Johnson v. Badger M. & M. Co.*, 351.
2. **IDEM—OMISSION OF WORD "BE."**—The omission of the word "be" in the sentence "H. G. Rollings to the president of the Badger mill and mining company:" *Held*, to be a clerical error that should be disregarded; that the certificate when read entire sufficiently identifies Rollins as the person who signed and acknowledged the instrument. *Id.*
3. **IDEM—ACTUAL KNOWLEDGE OF DEED.**—A defective acknowledgment cannot be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage. *Id.*

ACTION.

AGAINST RAILROAD COMPANY. (See Railroads, 2, 8.) 106-7.

SUFFICIENCY OF COMPLAINT IN ACTION FOR DAMAGES. (See Railroads, 9, 10, 11.) 184.

ENTITLING AFFIDAVITS. (See Affidavit, 1.) 195.

ACTIONS FOR DIVERSION OF WATER—FORM OF JUDGMENT. (See Water Rights, 1.) 251.

ACTION OF TROVER—FORM OF VERDICT. (See Trover, 6.) 257.

WHEN SAME CAUSE OF ACTION MAY BE SEVERED. (See Taxes, 6.) 286.

WITHDRAWAL OF PENALTIES IN TAX SUIT WHEN NOT A DISMISSAL OF THE ACTION. (See Taxes, 7.) 286.

JUDGMENT FOR COSTS IN CRIMINAL ACTION—WHEN NUGATORY. (See Criminal Law, 12.) 429.

STOCKHOLDERS CAN BRING SUIT FOR DAMAGES AGAINST CORPORATION. (See Corporation, 1.) 431.

WHEN ACTION BETWEEN PARTNERS MAY BE SUSTAINED AT LAW. (See Partnership, 1, 2.) 499.

AFFIDAVITS.

1. ENTITLING AFFIDAVITS.—The affidavits used on motion to set aside default, were simply entitled "State of Nevada, Storey County:" *Held*, that inasmuch as the affidavits intelligibly referred to the respective actions, the fact that they were not properly entitled therein was immaterial. *State v. C. V. & C. M. Co.*, 195.

AFFIDAVIT OF MERITS—DEFAULT. (See Default, 2.) 195.

AGENCY.

See PRINCIPAL AND AGENT.

AGREEMENT.

AGREEMENT CONSTRUED—COUNTER-CLAIM. (See Counter-claim, 2.) 421.

ANSWER.

DENIALS IN ANSWER WHEN INSUFFICIENT. (See Pleadings, 1.) 107.

ADMISSIONS IN ANSWER. (See Pleadings, 6.) 486.

APPEAL.

1. JURISDICTION ON APPEAL FROM JUSTICE'S COURT—JUDGMENT BY DEFAULT.—No appeal lies from a judgment rendered by default in a justice's court. The district court can only retry issues of law or fact that were made in the justice's court. *Martin v. District Court*, 86.
2. UNDERTAKING ON APPEAL—SUFFICIENCY OF.—An undertaking which complies with section three hundred and forty-two of the civil practice act (1 Comp. Laws, 1403), for the stay of execution, with the exception of binding the sureties to pay in gold coin: *Held*, to be a sufficient undertaking on appeal, as required by section three hundred and forty-one (1 Comp. Laws, 1402), for the payment of all "damages and costs" awarded on appeal. *State v. Cal M. Co.* 203.
3. IDEM—EXECUTED ON SUNDAY.—An undertaking on appeal executed on Sunday is valid. The execution of such a bond is not "transacting judicial business," and is not prohibited by the statute. (1 Comp. Laws, 4.) *Id.*
4. APPEAL DISMISSED WHEN NOT TAKEN IN TIME.—If an appeal from the judgment is not taken within one year (1 Comp. Laws, 1391), it will be dismissed. *Solomon v. Fuller*, 276.

WHEN STATEMENT ON MOTION FOR NEW TRIAL IS NOT A STATEMENT ON APPEAL. (See Statement, 1.) 234.

WHEN STATEMENT ON MOTION FOR NEW TRIAL SHOULD BE STRICKEN OUT. (See Statement, 2.) 276.

ASSAULT.

MALICE—ASSAULT WITH INTENT TO KILL. (See Criminal Law, 13.) 503.

ASSIGNEE.

TITLE TO PROPERTY WHEN NOT AFFECTED BY THE DECLARATIONS OF THE ASSIGNEE OF A CONTRACT. (See Declarations, 1.) 44.

ASSIGNMENT.

INLAND BILLS OF EXCHANGE NOT AN ASSIGNMENT OF FUNDS. (See Bills of Exchange, 1.) 359.

ASSIGNMENT BY SUB-CONTRACTORS. (See Contracts, 5.) 427.

ATTACHMENT.

1. UNDERTAKING TO PREVENT THE LEVY OF ATTACHMENT—WHEN SURETIES ARE NOT LIABLE.—When sureties, not knowing that a writ of attachment has been levied upon the property of the defendant in an attachment suit, execute an undertaking to prevent the levy of an attachment, and the property that had been previously levied upon is subsequently released from the attachment: *Held*, in an action against the sureties, that their promise was only to prevent a levy of the writ of attachment, and that they could not be held liable for the release of the property after the attachment had been levied. *Laveaga v. Wise*, 296.

ATTORNEY.

1. RULE EIGHT—ARGUMENT OF COUNSEL.—The “argument” mentioned in rule eight of the supreme court refers to an oral argument before the court. Agreeing to waive argument, and taking time to file brief on the merits of case is the same, in effect, as an oral argument. *State v. Cal. M. Co.*, 203.

APPEARANCE OF ATTORNEYS IN TAX SUITS. (See Attorney-general, 1.) 203.

ATTORNEY-GENERAL.

TAX SUITS—CONTROL OF, BY ATTORNEY-GENERAL—APPEARANCE OF OTHER ATTORNEYS.—The attorney-general has the entire control of all tax suits in the supreme court, on the part of the state. Other attorneys may appear by consent of the attorney-general, but not otherwise. If nothing to the contrary is shown, the court will always presume that an attorney appearing for the state in such suits is authorized by the attorney-general to act in the case. *State v. Cal. M. Co.*, 203.

BAILEE.

LIABILITY OF BAILEE. (See Trover, 4.) 45.

BILLS OF EXCHANGE.

INLAND BILLS OF EXCHANGE NOT AN ASSIGNMENT OF FUNDS.—An order in the form of an inland bill of exchange not upon any particular fund is not, before acceptance, an assignment, and does not create any lien in favor of the holder upon funds of the drawer in the hands of the drawee. *Jones v. P. W. L. & F. Co.*, 359.

BILLS AND NOTES.

CONSIDERATION OF NOTE GIVEN BY AGENT—WHEN SUFFICIENT.—Where an agent receives money from his principal and loans it out upon mortgage taken in his own name, and afterwards, for the purpose of securing the principal for the loan, gives his own note, and as a defense to this note claims that it was given without consideration: *Held*, that if the agent

had absolutely sold and assigned the mortgage to a third party and appropriated the money received thereby, to his own use, this would constitute a sufficient consideration to uphold the note as a cause of action, to the extent of the principal's proportion of the whole value of the mortgaged property. *Estie v. Simpson*, 472.

DEFENSE TO PROMISSORY NOTE. (See Parol Evidence, 1.) 421.

BOND OF INDEMNITY.

SUFFICIENCY OF COMPLAINT. (See Pleadings, 3.) 341.

SURETIES. (See Practice Act, 3.) 341.

BOUNDARIES.

BOUNDARIES OF LAND—WATER-COURSES—ISLAND. (See Water Rights, 2, 3.) 261.

BURDEN OF PROOF:

POSSESSION OF LAND—SURVEYS, WHEN RECORDED. (See Surveys, 1.) 396.

CASES CITED AS AUTHORITY.

Alcalde v. Morales, 3 Nev. 137, in *Bishop v. Stewart*, 35; *Jones v. Pacific Wood L. & F. Co.*, 375.

Alderson v. Gilmore, 13 Nev. 84, in *Hanson v. Chiatovich*, 396.

Bingham v. Thompson, 4 Nev. 237, in *Pierce v. Traver*, 530-1.

Bowker v. Goodwin, 7 Nev. 137, in *Alderson v. Gilmore*, 85.

Boylan v. Huguet, 8 Nev. 358, in *Ward v. Carson River W. Co.*, 62-3; in *Waters v. Stevenson*, 167.

Buckley v. Buckley, 12 Nev. 424, in *Ward v. Carson River W. Co.*, 62-3; in *Waters v. Stevenson*, 167.

Caples v. Central Pacific R. R. Co., 6 Nev. 271, in *Terry v. Berry*, 523.

Clark v. Shannon, 1 Nev. 569, in *Smith v. Stuart*, 68-77.

Corbett v. Job, 5 Nev. 202, in *Alderson v. Gilmore*, 85.

Courtney v. Turner, 12 Nev. 350, in *Rivers v. Burbank*, 402-4.

Crane, Hastings & Co. v. Gloster, 13 Nev. 279, in *Vesey v. Benton*, 285-6.

Dean v. Pritchard, 9 Nev. 232, in *Hanson v. Chiatovich*, 396.

Estate of Walley, 11 Nev. 264, in *Smith v. Shrieves*, 316.

Eureka M. Co v. Way, 11 Nev. 182, in *Rivers v. Burbank*, 409, 414.

Ex parte Robinson, 12 Nev. 263, in *Ex parte Cohn*, 427.

Gaudette v. Travis, 11 Nev. 149, in *Solen v. V. & T. R. R. Co.*, 135.

Gillig v. Lake Bigler R. Co., in *Martin v. District Court*, 89.

Gilson v. Boston, 11 Nev. 414, in *Martens v. Gilson*, 492.

Golden Fleece M. Co. v. Cable Consolidated Co. 12 Nev. 312, in *Gleeson v.*

Martin White M. Co., 455, 460, 471.

Goldman v. Clark, 1 Nev. 607, in *Smith v. Stewart*, 68-77.

Gregory v. Frothingham, 1 Nev. 262, in *Swan v. Smith*, 260.

Harper v. Mallory, 4 Nev. 447, in *State v. Con. Vir. M. Co.*, 195.

Harvey v. Sides S. M. Co., 1 Nev. 543, in *Waters v. Stevenson*, 173.

Hawthorne v. Smith, 3 Nev. 185, in *Smith v. Stewart*, 70.

Howard v. Richards, 2 Nev. 133, in *Williams v. Rice*, 235.

Howe v. Coldren, 4 Nev. 171, in *State v. Con. Vir. M. Co.* 195.

Humboldt M. & M. Co. v. Terry, 11 Nev. 237, in *Terry v. Berry*, 521.

- Imperial S. M. Co. v. Barstow, 5 Nev. 254, in Alderson v. Gilmore, 85; Williams v. Rice, 242.
- Klein v. Allenbach, 6 Nev. 133, in Williams v. Rice, 235.
- Lee v. McLeod, 12 Nev. 280, in Gooch v. Sullivan, 79, 83.
- Lewis v. Wilcox, 6 Nev. 215, in Solen v. V. & T. R. R. Co., 135.
- Longabaugh v. V. & T. R. R. Co., 9 Nev. 302; in Solen v. V. & T. R. R. Co., 135; State v. Con. Vir. M. Co., 195.
- McCausland v. Lamb, 7 Nev. 238, in Williams v. Rice, 235.
- McCoy v. Bateman, 8 Nev. 127, in Solen v. V. & T. R. R. Co., 135.
- McFarland v. Culbertson, 2 Nev. 282, in Rivers v. Burbank, 214.
- Ormsby Co. v. State, 6 Nev. 286, in Smith v. Shrieves, 316.
- Paul v. Armstrong, 1 Nev. 96, in Martins v. District Court, 90.
- People v. Bonds, 1 Nev. 36, in State v. Tickel, 511.
- Perkins v. Barnes, 3 Nev. 557, in Ward v. Carson River W. Co., 62.
- Phillipotts v. Blasdel, 8 Nev. 76, in Solen v. V. & T. R. R. Co., 135.
- Rogers v. Cooney, 7 Nev. 217, in Rivers v. Burbank, 404.
- Sharon v. Minnock, 6 Nev. 383, in Gooch v. Sullivan, 81.
- Scott v. Haynes, 4 Nev. 428, in Thomas v. Sullivan, 249.
- Staininger v. Andrews, 4 Nev. 66, in Rivers v. Burbank, 405, 412.
- State v. Ah Mook, 12 Nev. 369, in State v. Rover, 20-1.
- State v. Ah Tong, 7 Nev. 152, in State v. Tickel, 511.
- State v. Burns, 8 Nev. 251, in State v. Rover, 20.
- State v. California M. Co., 13 Nev. 203, in State v. Con. Vir. M. Co. 228.
- Matter of Rourke, 256.
- State v. Con. Vir. M. Co., 296.
- State v. Central Pacific R. R. Co., 10 Nev. 49, in Solen v. V. & T. R. R. Co., 135.
- State v. Central Pacific R. R. Co., 7 Nev. 103, in Ferguson v. V. & T. R. R. Co., 191.
- State v. Chapman, 6 Nev. 329, in State v. Hamilton, 392.
- State v. Eureka Con. M. Co., 8 Nev. 29, in State v. Cal. M. Co., 216; State v. Northern Belle M. & M. Co., 250.
- State v. Ferguson, 9 Nev. 118, in State v. Rover, 24; State v. Hamilton, 387.
- State v. Forshay, 8 Nev. 137, in State v. Rover, 20.
- State v. Glovery, 10 Nev. 34, in Schafer v. Gilmer, 340.
- State v. Harkins, 7 Nev. 381, in State v. Tickel, 511.
- State v. Huff, 11 Nev. 17, in State v. Rover, 20.
- State v. Larkin, 11 Nev. 314, in State v. Rover, 20.
- State v. Logan, 1 Nev. 516, in State v. Hamilton, 389.
- State v. Manhattan S. M. Co., 4 Nev. 318, in More v. Lott, 385.
- State v. Millain, 3 Nev. 409, in State v. Hamilton, 389.
- State v. Mills, 12 Nev. 401, in State v. Rover, 20-1.
- State v. Nelson, 11 Nev. 340, in State v. Rover, 24.
- State v. O'Connor, 11 Nev. 416, in State v. Rover, 24; State v. Hamilton, 387, 394; State v. Tickel, 514.
- State v. Rigg, 10 Nev. 289, in State v. Hamilton, 389.
- State v. Rover, 11 Nev. 343, in State v. Rover, 20-1.
- State v. Yellow Jacket S. M. Co., 5 Nev. 415, in Solen v. V. & T. R. R. Co., 135.
- Thomas v. Sullivan, 13 Nev. 242, in Greenwell v. Nash, 288.

Thorne v. Sweeney, 12 Nev. 254, in *Rivers v. Burbank*, 402-4.
 Tinkum v. O'Neale, 5 Nev. 93, in *Stevenson v. Mann*, 274.
 V. & T. R. Co. v. Henry, 8 Nev. 165, in *V. & T. R. Co. v. Lynch*, 102.
 Ward v. Carson River W. Co., 13 Nev. 44, in *Waters v. Stevenson*, 168.
 Warren v. Quill, 9 Nev. 264, in *More v. Lott*, 390.
 Whitman G. & S. M. Co. v. Tritle, 4 Nev. 499, in *Ward v. Carson River W. Co.*, 62, 63.

CASES COMMENTED UPON, CRITICISED OR REFERRED TO.

Barnes v. Sabron, 10 Nev. 240, in *Shoemaker v. Hatch*, 267.
 Bowers v. Beck, 2 Nev. 139, in *Laveaga v. Wise*, 301.
 Courchaine v. Bullion M. Co., 4 Nev. 174, in *Shoemaker v. Hatch*, 267.
 Heydenfeldt v. Daney G. & S. M. Co., 11 Nev. 290, in *Shoemaker v. Hatch*, 267.
 Layton v. Farrell, 11 Nev. 455, in *Shoemaker v. Hatch*, 267.
 Kidd v. Four-Twenty M. Co., 3 Nev. 385, in *Martin v. District Court*, 90.

CERTIFICATE.

CERTIFICATE OF TAX SALE—WHEN SIGNATURE OF OFFICER MUST BE PROVEN.
 (See *Taxes*, 1.) 45.

FORM OF ACKNOWLEDGMENT. (See *Acknowledgment*, 1, 2, 3.) 351.

CERTIORARI.

1. CERTIORARI—WHEN ISSUED.—The writ of certiorari can only be issued where the inferior tribunal, in the exercise of judicial functions, has exceeded its jurisdiction. *Matter of Rourke*, 253.
2. IDEM—JUSTICE OF THE PEACE—ISSUANCE OF EXECUTION A MINISTERIAL ACT.—A justice of the peace, in issuing an execution upon a judgment, acts ministerially, and such act, however erroneous, cannot be reviewed upon certiorari. *Id.*

CIVIL PRACTICE ACT.

See *PRACTICE ACT*.

CLAIMS.

CLAIMS AGAINST MUNICIPAL CORPORATIONS. (See *Constitution*, 2.) 439.

CLERK.

CLERK'S FEES IN CRIMINAL CASES. (See *Criminal Law*, 2.) 17.

COMPENSATION.

CONDEMNATION OF LAND. (See *Railroads*, 1.) 92.

DAMAGES FOR EXTRACTING ORE FROM MINES. (See *Mining Claims*, 3.) 157.

COMPILED LAWS.

See *STATUTES*, "COMPILED LAWS CITED."

COMPLAINT.

PLEADINGS IN JUSTICE'S COURT. (See *Justice of the Peace*, 1.) 85.

- ACTION FOR DAMAGES. (See Railroads, 9, 10.) 184.
- WHEN SUIT FOR TAXES AND PENALTIES MAY BE SEVERED. (See Taxes, 6.) 286.
- COMPLAINT ON INDEMNITY BOND. (See Pleadings, 3.) 341.
- PARTIES HAVING NO JOINT INTEREST AS PLAINTIFFS. (See Pleadings, 4.) 356.
- WAIVER OF OBJECTIONS TO FORM OF COMPLAINT. (See Pleadings, 7.) 492.

CONGRESS.

- LOCATION OF MINING CLAIMS UNDER ACTS OF CONGRESS. (See Mining Claims, 4-10.) 443.

CONSIDERATION.

- CONSIDERATION OF A NOTE GIVEN BY AGENT TO PRINCIPAL—WHEN SUFFICIENT. (See Bills and Notes, 1.) 472.

CONSTITUTION.

1. TAX ON FOREIGN INSURANCE COMPANIES—CONSTITUTIONAL.—In construing the provisions of the act to regulate and tax foreign insurance companies (2 Comp. Laws, 3947): *Held*, that the imposition of the percentage on premiums is a tax upon the business of the insurance companies, and is not repugnant to the provisions of article 10 of the state constitution. (*Ex parte Robinson*, 12 Nev. 263, affirmed; *Ex parte Cohn*, 424.)
2. LEGISLATURE CANNOT EXERCISE JUDICIAL POWERS—CLAIMS AGAINST MUNICIPAL CORPORATIONS.—In construing the provisions of the act providing for the payment of outstanding indebtedness of Virginia City (Stat. 1844, 5, 325): *Held*, that said act, in so far as it undertakes to definitely fix the amount due to the persons therein named, is an attempt upon the part of the legislature to exercise judicial powers, and is repugnant to section 1 of article III of the state constitution. *State ex rel. Arick v. Hampton*, 439.

- REMARKS OF COURT IN THE PRESENCE OF THE JURY. (See Criminal Law, 15.) 502.

PROVISIONS CITED.

- Art. IV. Sec. 30. Homestead, 327.
- “ V. “ 21. Board of State Prison Commissioners, 420.
- “ VI. “ 4-6. Jurisdiction on Appeal, 105.
- “ X. Taxation, 426-7.

CONTRACTS.

1. SALE OF PERSONAL PROPERTY—VERBAL CONTRACT BY VENDEE TO PAY DEBTS OF THE VENDOR—CONDITIONS OF SALE.—One McAvoy, having the possession of certain personal property, and being indebted to B. & C. in the sum of six hundred dollars and to S. in the sum of four hundred dollars, agreed to let S. have the property and to give him a clear title thereto if he would pay the debt due B. & C., sell the property and from the proceeds take out the debt of B. & C., his own debt, and pay the balance to McAvoy. S. agreed to this contract, provided no other

person had any claim on the property conveyed. S. took possession of the property, and the next day was notified that McAvoy's title as to a portion of the property was not complete; that he had the privilege of making his title perfect by paying one Goldstone the sum of three hundred and seventy dollars. Whereupon he either made an effort to rescind the contract by informing B. & C. that he would not pay McAvoy's indebtedness to them, or elected to consider the contract rescinded by the terms thereof; but retained possession of all the property, after full knowledge of Goldstone's claim, and under a new arrangement, in which B. & C. did not participate, he paid to Goldstone the amount due him, and took a bill of sale for the property from both McAvoy and Goldstone: *Held*, that S. could not, upon this state of facts, avoid the payment of the debt of six hundred dollars to B. & C. *Bishop v. Stewart*, 25.

2. CONTRACT—HOW RESCINDED.—A party cannot rescind a contract and at the same time retain possession of the consideration, in whole or in part, which he has received under it. He must rescind *in toto*, or not at all. *Id.*
3. CONTRACT FOR THE SALE OF ORE CONSTRUED—ASSAYS TO BE SAMPLED WHEN.—In a contract for the sale of ore at prices regulated by the assay value per ton, and the ores delivered to be paid for monthly: *Held*, that the assays of the ore were to be averaged at the end of each month, and not taken in separate lots and quantities as delivered. *Kennedy v. Schwartz*, 229.
4. IDEM—NON-COMPLIANCE OF TERMS OF A CONTRACT—AMOUNT TO BE RECOVERED.—The plaintiff agreed to deliver to defendant one thousand tons of ore within three months. The defendant, on his part, agreed to pay for each one hundred tons, as soon as delivered, one thousand dollars. In an action brought to recover the value of the ores delivered to the defendant: *Held*, that if the defendant had failed to comply with the provisions of the contract, the plaintiff would be entitled to recover the full contract price of all ores delivered; but if the plaintiffs had failed or refused to comply with its terms, they could only recover for each and every one hundred tons of ore indivisible, and would be liable for damages, if any were sustained by reason of their non-compliance with the terms of the contract. *Id.*
5. CONTRACT FOR CUTTING WOOD—ASSIGNMENT BY SUB-CONTRACTORS.—One Johnson had a contract with the P. W. L. & F. Co., for cutting wood. Smith (plaintiff) and one Russell were sub-contractors under him. Johnson assigned the contract to the defendant, who agreed to pay the sub-contractors; they assenting to the arrangement released Johnson and accepted Mayberry in his place; subsequently Russell assigned his rights under the contract to plaintiff: *Held*, that the court did not err in overruling a demurrer to the complaint, on the ground that it did not aver that the assignment from Russell was made with defendant's assent. *Smith v. Mayberry*, 427.
6. KNOWLEDGE OF SUB-CONTRACTOR AS TO TERMS OF PRINCIPAL CONTRACT IMMATERIAL.—If a sub-contractor has knowledge of the terms of the principal contract, that fact does not tend to prove that he contracted upon the same terms. *Id.*

WHEN TITLE TO PROPERTY IS NOT AFFECTED BY THE DECLARATIONS OF AN ASSIGNEE TO A CONTRACT. (See Declarations, 1.) 45.

CONTRIBUTORY NEGLIGENCE.

See RAILROADS, 3. 106.

INJURIES CAUSED BY THE BREAKING OF A DITCH. (See Water Rights, 7.) 431.

CONVERSION.

WHEN CONVERSION TAKES PLACE. (See Trover, 3, 4.) 45.

CORPORATION.

1. STOCKHOLDERS CAN BRING SUIT FOR DAMAGES AGAINST CORPORATION.—

Where damages are claimed on account of mismanagement by the corporation against which the plaintiffs as officers and stockholders constantly protested: *Held*, that plaintiffs, as stockholders, could maintain the action. *Burbank v. West Walker R. D. Co.*, 439.

INJURIES CAUSED BY THE BREAKING OF A DITCH—CONTRIBUTORY NEGLIGENCE. (See Water Rights, 7.) 431.

CLAIMS AGAINST MUNICIPAL CORPORATIONS. (See Constitution, 2.) 439.

AUTHORITY OF PRESIDENT. (See Pleadings, 6.) 486.

COSTS.

1. COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST OR FINE."—An order of a justice's court imposing costs against a garnishee that had refused to make a statement, is not a "tax, impost, assessment, or municipal fine," within the meaning of those words as used in section 4, article vi, of the state constitution. *Wearne v. Haynes*, 103.

ACTIONS FOR DIVERSION OF WATER. (See Water Rights, 1.) 251.

INJUNCTION—NOMINAL DAMAGES. (See Injunction, 2.) 415.

JUDGMENT FOR COSTS IN CRIMINAL ACTION MUST STATE THE AMOUNT. (See Criminal Law, 12.) 429.

COUNSEL.

See ATTORNEY.

COUNTER-CLAIM.

1. COUNTER-CLAIM.—A demand of one of several defendants cannot be pleaded as a counter-claim to a demand upon which they are jointly liable, unless there is an agreement that it shall so operate. *Davis v. Noteware*, 421.
2. *IDEM*—AGREEMENT CONSTRUED.—The agreement relied upon to establish a counter-claim, provided that any sum found to be due from Davis & Freeman to W. F. Davis (defendant) should remain in the hands of D. & F. until the note sued on has been paid, and until all claims against D. & F. for certain indebtedness are paid: *Held*, that by the terms of said contract the indebtedness therein mentioned was not to be credited upon the note. *Id.*

COURTS.

ORDERS MADE ON SUNDAY. (See Sunday, 1.) 18.

FINDINGS OF COURT—WHEN NO PART OF THE RECORD. (See Findings, 1.) 84.

PLEADINGS IN JUSTICES' COURT. (See Justice of the Peace, 1.) 85.

WHEN OBJECTIONS MUST BE MADE. (See Objections, 2.) 195.

RULES OF COURT—ARGUMENT OF COUNSEL. (See Attorney, 1.) 203.

CRIMINAL LAW.

1. **RECORD IN CRIMINAL CASE.**—The record in a criminal case consists only of such matter as is required by sections 450 and 480 of the criminal practice act. (1 Comp. Laws, 2075, 2105). *State v. Rover*, 17.
2. **IDEM—CLERK'S FEES.**—A clerk, in preparing a transcript on appeal, is only entitled to receive pay for copying such papers, documents and statements as are provided for by said sections. *Id.*
3. **POWER OF COURT TO GRANT A NEW TRIAL.**—The supreme court has the power to grant a new trial in a criminal case, although not asked for by the defendant. (*State v. Rover*, 10 Nev. 388, affirmed.) *Id.*
4. **STATEMENT OF DEFENDANT ON PRELIMINARY EXAMINATION—HOW TAKEN AND WHEN ADMISSIBLE IN EVIDENCE.**—The committing magistrates may select clerks to write out the testimony taken on preliminary examination; and when the provisions of the law for taking such testimony have been complied with, the statement then made by defendant is admissible in evidence against him upon the trial of the case. *Id.*
5. **PROSECUTING WITNESS—WHEN ALLOWED TO GIVE HIS REASONS FOR FILING A COMPLAINT AGAINST THE DEFENDANT.**—When the defendant, on his preliminary examination, makes a statement accusing the prosecuting witness of the commission of the crime for which the defendant is afterwards indicted: *Held*, that the prosecuting witness may, upon the trial, give in evidence the declarations of third persons made to him prior to the filing of the complaint, for the purpose of explaining his conduct to the jury. (By Hawley, C. J.) *Id.*
6. **REFUSAL OF AN INSTRUCTION ALREADY GIVEN IN SUBSTANCE BY THE COURT IS NOT ERROR.** (*State v. O'Connor*, 11 Nev. 416, affirmed.) *Id.*
7. **INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE—MEANING OF WORDS "ABSOLUTELY INCOMPATIBLE."**—The court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt:" *Held*, that the words "absolutely incompatible," as contained in the instruction, imply that the proof of defendant's guilt must be established beyond the possibility of a doubt, and for that reason the court did not err in refusing the instruction. *Id.*
8. **REASONABLE DOUBT—INSTRUCTIONS.**—The court refused the following instruction asked by the defendant: "The jury is instructed that unless they are satisfied beyond a reasonable doubt that the defendants are guilty; that is to say, if you entertain a reasonable doubt upon any material point in the testimony essential to a conviction, you must give the defendants the benefit of the doubt, and acquit them:" *Held*, that the instruction was correct, and ought to have been given. Upon rehearing: *Held*, that the same principles having in substance been given in other instructions asked by the defendants, the refusal of the instruction was

not error. (*State v. O'Connor*, 11 Nev. 425, affirmed.) *State v. Hamilton*, 336.

9. INSTRUCTION—CRIME COMMITTED IN ONE COUNTY WHEN ONE OF DEFENDANTS IS IN ANOTHER COUNTY.—The court refused to give the following instruction asked by defendant Laurie: "The jury is instructed that if they believe that an attempt was made to rob, as alleged in the indictment, and that at the time such attempt was made, the defendant, Laurie, was in Eureka county, Nevada, then they cannot convict him: *Held*, in the absence of any evidence showing the facts not to be error. *Id.*
10. IDEM—PRINCIPAL OR ACCESSORY BEFORE THE FACT.—Admitting the facts to be, as claimed by Laurie, that a plan was arranged between Laurie and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye county; that Laurie was to ascertain when the treasure left Eureka, and signal his confederates by building a fire on the top of a mountain in Eureka county, which could be seen by them in Nye county, thirty or forty miles distant; that the signals were given by him, and his confederates attacked the stage and attempted to rob the treasure: *Held*, that Laurie would be not only an accessory before the fact, but a principal, at least in the second degree. *Id.*
11. IDEM.—Where several confederates act in pursuance of a common plan, in the commission of an offense, all are held to be present where the offense is committed, and all are principals. *Id.*
12. CRIMINAL ACTION—JUDGMENT FOR COSTS—WHEN NUGATORY.—Relators were found guilty of assault and battery, fined in the sum of one hundred dollars each "and the costs of this action:" *Held*, that this was only a judgment for the amount of the fine; that the judgment relating to costs, the amount not being stated, was surplusage and nugatory. *State ex rel. Burbank v. Jameson*, 429.
13. CRIMINAL LAW—DEPOSITIONS ON PRELIMINARY EXAMINATION—IMPEACHMENT OF WITNESS AT TRIAL.—When the deposition of a witness has been taken on preliminary examination, and the witness is present at the trial: *Held*, that the deposition may be used for the purpose of impeaching the testimony of the witness. *State v. Tickel*, 502.
14. IDEM—COURT CANNOT INSTRUCT JURY AS TO FACTS.—The question whether a witness is unworthy of belief is to be decided by the jury upon the evidence, without comment or instructions by the court upon questions of fact. *Id.*
15. IDEM—REMARKS OF THE COURT.—During the trial the court asked a witness, "Don't you ever make mistakes in taking down testimony in a justice's court?" and after the reply: "It may be possible, your honor, but we try not to," made the remark, in the presence of the jury: "Well, if you don't you are the first justice of the peace I ever heard of who does not make a mistake occasionally:" *Held*, that the remarks were in substance and effect an instruction to the jury upon questions of fact, and were in violation of defendant's constitutional rights. *Id.*
16. INSTRUCTION—REAL OR APPARENT FACTS.—An instruction to the jury that, in considering whether or not the defendant was guilty, it was their duty to carefully scrutinize all the testimony in the case, and not

to be misled by apparent, but not real, facts, is not calculated to mislead the jury. *Id.* 503.

17. **IDEM—MALICE—ASSAULT WITH INTENT TO KILL.**—An instruction which is so worded as to convey the idea that "malice or deliberate purpose on the part of the defendant" is a necessary element of the crime of assault with intent to kill: *Held*, erroneous. *Id.*

JUDGMENT OF CONVICTION REGULAR ON ITS FACE IS NOT REVIEWABLE UPON HABEAS CORPUS. (See Habeas Corpus, 2.) 302.

TESTIMONY OF GRAND JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR ACTS. (See Grand Jury, 1.) 386.

MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA. (See Indictment, 1.) 386.

DEPOSITIONS OF WITNESSES TO BE INDORSED ON INDICTMENT. (See Indictment, 1.) 386.

CRIMINAL PRACTICE ACT.

Section 91. Accessory before the Fact, 390-2.

Sections 152-8. Preliminary Examination, 21.

Section 229. Names of Witnesses to be Indorsed upon Indictment, 388.

Section 252. Accessory before the Fact, 391.

Sections 274-9. Motion to set Aside Indictment, 388.

Section 450. Record in Criminal Case, 20.

Section 480. Record in Criminal Case, 20.

(See Statutes—"Compiled Laws Cited.")

CROSS-EXAMINATION.

CREDIBILITY OF WITNESS. (See Witness, 1.) 500.

CUSTOM.

1. **CUSTOM AS TO POSSESSORY TITLE NOT ADMISSIBLE.**—Instructions informing the jury that they might consider any well known or recognized customs among the farmers, as to the manner of claiming and holding land by possessory title: *Held*, inadmissible. *Rivers v. Burbank*, 399.

DAMAGES.

1. **DAMAGES, WHEN NOT EXCESSIVE.**—The plaintiff claimed that, by the upsetting of defendant's stage-coach, he was so badly injured as to produce pneumonia, and that the disease of his lungs arising from such injuries, had become incurable. Upon this question there was a direct conflict of evidence: *Held*, that if the jury believed the testimony offered upon the part of plaintiff to be true, a verdict in his favor of five thousand dollars was not excessive. *Schafer v. Gilmer*, 330.

MEASURE OF DAMAGES. (See Trover, 5.) 45.

DAMAGES AGAINST RAILROAD COMPANY FOR PERSONAL INJURIES. (See Railroads, 2.) 106.

DAMAGES, WHEN NOT EXCESSIVE. (See Railroads, 7.) 107.

RULE OF DAMAGES AGAINST RAILROAD COMPANY. (See Railroads, 8.) 107.

DAMAGES FOR EXTRACTING ORE FROM MINES. (See Mining Claims, 1, 3.) 157.

DAMAGES FOR RIGHT OF WAY IN CONSTRUCTING WATER DITCH. (See Water Ditch, 4.) 261.

WHEN INJUNCTION SHOULD NOT BE ISSUED. (See Injunction, 1.) 398.

INJUNCTION—NOMINAL DAMAGES. (See Injunction, 2.) 415.

STOCKHOLDERS CAN BRING SUIT FOR DAMAGES AGAINST CORPORATION. (See Corporation, 1.) 431.

DECLARATIONS.

1. TITLE TO PROPERTY—WHEN NOT AFFECTED BY DECLARATIONS OF THE ASSIGNEE OF A CONTRACT.—Where the terms of a contract for cutting wood required the parties of the first part to advance certain supplies, and such moneys as they deemed "necessary to conduct the business to the best interests of both parties," and the contract was assigned by the parties of the first part to S. & Co., who refused to make any further advances, and said to the parties of the second part: "The wood is your wood to-day; it ain't my wood; it is your wood, and I can't go any further. I want you to keep the wood, and I will buy it from you when it is put into Wolf Creek:" *Held*, that such declarations did not vest the title to the wood in controversy in the parties of the second part. *Ward v. Carson River Wood Co.*, 44.

2. IDEM—ESTOPPEL.—*Held*, that the plaintiff was not estopped by such declarations from asserting his title to the property. *Id.*

TITLE TO PROPERTY—DECLARATIONS OF OWNER. (See Title, 1) 395.

DEED.

1. DEED FROM TOWN-SITE TRUSTEE—SUFFICIENCY OF.—The facts authorizing the grantees to receive a deed from the trustee need not be recited in the deed. A bargain and sale-deed in the usual form, reciting a consideration of one dollar is sufficient to convey the title to the land, and is *prima facie* evidence that it was delivered to the party intended to receive it. *Terry v. Berry*, 514.

2. DEED—PAROL EVIDENCE ADMISSIBLE TO EXPLAIN.—It is admissible to prove by parol that land sold under execution was situated in township thirty-six instead of township thirty, as described in the sheriff's deed. *Id.* 515.

3. IDEM—REFERENCES AND MONUMENTS.—The references and monuments contained in the deed, in the event of any discrepancy or mistake, control the other parts of the description. *Id.*

4. IDEM—WHEN DECLARED A MORTGAGE VALUE OF PROPERTY.—The mere fact that property was conveyed for less than its real value is not, of itself, sufficient to authorize the court to declare a deed absolute upon its face to be a mortgage. *Pierce v. Traver*, 528.

5. IDEM—TESTIMONY MUST BE CLEAR.—The proof necessary to show a deed absolute, upon its face, to be a mortgage, must be clear, convincing and satisfactory. Testimony reviewed and held insufficient to sustain the judgment. *Id.*

ACTUAL POSSESSION—DEED TO ENTIRE TRACT. (See Possession, 2.) 399.

DEFAULT.

1. DEFAULT—EXCUSABLE NEGLIGENCE.—Two suits were brought against the
VOL. XIII.—35.

Consolidated Virginia Mining Company, and two against the California Mining Company, for delinquencies and penalties for the non-payment of taxes. The complaint and summons in each case were served upon J. G. Fair, the managing agent of each corporation. He delivered the same to the regularly retained attorney for both corporations, with the request that the papers should be properly attended to. The attorney appeared and filed a demurrer in one of the suits against the Consolidated Virginia Mining Company, and also in one of the suits against the California Mining Company. Defaults were regularly entered in each of the other suits. The attorney of the corporation makes an affidavit that he had never known or heard of but one suit against each corporation, and had no recollection of but one complaint and summons having been left with him; that while unable to state positively that but one complaint and summons was left, he avers unqualifiedly that if more than one was left he did not apprehend it at the time; and that if he had known that more than one was left he would have appeared and filed a demurrer in each suit, as the questions to be litigated were the same in each action: *Held*, that the failure of the attorney to appear in both actions was an honest mistake, without fraud or negligence on the part of the corporations, their superintendent, or attorney, and that the facts stated in the affidavits, presented on motion to set aside the defaults, made out a case of excusable neglect. *State v. C. V. & C. M. Co.*, 195.

2. *IDEM*—AFFIDAVIT OF MERITS.—The attorney for defendants, in his affidavit, avers that he is familiar with all the facts upon which a recovery is sought in said actions; that he believes, and has so stated to defendants, that the defendants have a good and meritorious defense to each of said actions; that the subject-matter of said actions is *res adjudicata*, etc.: *Held*, sufficient.

See JUDGMENT BY DEFAULT.

DEMAND.

1. DEMAND—WHEN NOT NECESSARY.—When property is taken by a party without the owner's knowledge or consent, or levied upon and sold under an execution against another party, no demand is necessary to enable plaintiff to maintain an action for its recovery. *Hanson v. Chiatovich*, 395.

WHEN DEMAND IS NOT NECESSARY. (See *Trover*, 1.) 44.

DEMURRER.

WITHDRAWAL OF PENALTIES IN TAX SUIT NOT A DISMISSAL OF THE ACTION. (See *Taxes*, 7.) 286.

MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA. (See *Indictment*, 2.) 386.

DEPOSITIONS.

DEPOSITIONS OF WITNESSES USED BEFORE GRAND JURY MUST BE INDORSED ON INDICTMENT. (See *Indictment*, 1.) 386.

DEPOSITIONS ON PRELIMINARY EXAMINATION—IMPEACHMENT OF WITNESS. (See *Criminal Law*, 13.) 502.

DILIGENCE.

WANT OF DILIGENCE. (See Possession, 3.) 399.

DISTRICT ATTORNEY.

PERCENTAGE OF DISTRICT ATTORNEY IN TAX SUITS. (See Taxes.) 286

ERROR.

ERROR—MUST BE PREJUDICIAL.—An error in refusing to admit testimony is cured by the admission of the same testimony at a subsequent stage of the trial. *Richardson v. Hoole*, 493.

ERROR WHEN NOT PREJUDICIAL. (See Instructions, 1.) 25.

ESTOPPEL.

ESTOPPEL—MUST BE PLEAD.—Where a defendant relies upon the defense of estoppel, he must, in his answer, allege the facts constituting the estoppel. *Hanson v. Chiatovich*, 395.

DECLARATIONS OF ASSIGNEE. (See Declarations, 2.) 45.

ESTOPPEL. (See Mining Claims, 13.) 443.

EVIDENCE.

1. NEW TRIAL—CONFLICT OF EVIDENCE.—An order of the district court refusing to grant a new trial will not be reversed by the appellate court, upon the ground that the verdict is not sustained by the evidence when there is a substantial conflict in the testimony. *Smith v. Mayberry*, 427; *Solen v. V. & T. R. R. Co.*, 107; *Duquette v. Ouilmette*, 499.

2. CONFLICT OF EVIDENCE.—Testimony reviewed and held sufficient to sustain the verdict. *Richardson v. Hoole*, 493.

3. IMMATERIAL TESTIMONY—WHEN ADMISSIBLE.—Where the defendant was permitted to show that he had overdrawn his bank account for the purpose of showing that he had loaned his credit to plaintiff: *Hehl*, although the testimony was immaterial, that plaintiff had the right to show by the same witness that the overdrafts were on account of defendant's stock speculations. *Id.*

WHEN STATEMENT ON PRELIMINARY EXAMINATION IS ADMISSIBLE. (See Criminal Law, 4.) 17.

WHERE AND HOW OBJECTIONS TO EVIDENCE MUST BE MADE. (See Objections, 1.) 78.

VERDICT AGAINST EVIDENCE. (See New Trial, 1.) 107.

INSTRUCTIONS CONSIDERED WITH REFERENCE TO THE PLEADINGS AND EVIDENCE. (See instructions, 4.) 330.

DAMAGES WHEN NOT EXCESSIVE. (See Damages, 1.) 330.

RIGHT OF STOPPAGE IN TRANSITU. (See Stoppage in Transitu, 1-4.) 376.

TESTIMONY OF GRAND JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR ACTS. (See Grand Jury, 1.) 386.

DOCUMENTARY EVIDENCE MUST BE EMBODIED IN A STATEMENT. (See Findings, 4.) 395.

- PRESUMPTION AS TO OWNERSHIP OF PROPERTY. (See Presumptions, 1.) 395.
- TITLE TO PROPERTY—DECLARATIONS OF OWNER. (See Title, 1.) 395.
- POSSESSION OF PERSONAL PROPERTY PRIMA FACIE EVIDENCE OF OWNERSHIP. (See Possession, 1.) 395.
- WHEN SURVEYS OF LAND SHOULD BE RECORDED. (See Survey, 1.) 398.
- CUSTOM AS TO POSSESSION OF LAND IS NOT ADMISSIBLE. (See Custom, 1.) 399.
- EXISTENCE OF JUDGMENT CANNOT BE SHOWN BY PAROL. (See Parol Evidence, 1.) 421.
- KNOWLEDGE OF SUB-CONTRACTORS TO TERMS OF PRINCIPAL CONTRACT IS IMMATERIAL. (See Contract, 6.) 427.
- VERDICT SUSTAINED BY THE EVIDENCE. (See Water Rights, 5.) 431.
- ERROR MUST BE PREJUDICIAL. (See Error, 1.) 493.
- CREDIBILITY OF WITNESS. (See Witness, 1.) 500.
- WHEN PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN DEED. (See Deed, 2, 3.) 515.
- STATEMENT NOT CONTAINING ALL THE EVIDENCE. (See Statement, 4.) 514.
- DEED, WHEN DECLARED A MORTGAGE. (See Deed, 4, 5.) 526.

FINE.

- COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST, OR FINE." (See Costs, 1.) 103.

FINDINGS.

1. FINDINGS—NO PART OF THE RECORD.—The findings of the district judge cannot be considered on appeal, unless they are embodied in the statement of the case. *Alderson v. Gilmore*, 84.
 2. AGREED STATEMENT OF FACTS TAKE THE PLACE OF FINDINGS.—When the statement and recitals in the judgment show that there was no trial of any issue of fact, that no findings of fact were filed, and that the facts were settled by stipulation: *Held*, that the pleadings and stipulation stand in the place of the findings, and authorize the court to consider the question whether or not the judgment is supported by the facts agreed upon. *Laveaga v. Wise*, 296.
 3. FINDINGS OF FACT—WHEN WILL BE PRESUMED.—Where a judgment is rendered for plaintiffs upon certain findings, in his favor, without any reference to the findings of fact upon certain issues raised in the defendant's answer: *Held*, that it will be presumed that such issues were found against the defendant. *More v. Lott*, 376.
 4. FINDINGS—DOCUMENTARY EVIDENCE MUST BE EMBODIED IN A STATEMENT.—Neither the findings of the court below, nor the documentary evidence admitted at the trial will be considered in the appellate court unless embodied in the statement or identified as required by statute. *Hanson v. Chiatovich*, 395.
 5. SUBSTANTIAL CONFLICT OF TESTIMONY SUFFICIENT TO SUSTAIN FINDINGS OF THE COURT. *Duquette v. Ouilmette*, 499.
- STATEMENT NOT CONTAINING ALL THE EVIDENCE. (See Statement, 4.) 514.

FOREIGN INSURANCE COMPANIES.

TAX ON FOREIGN INSURANCE COMPANIES IS CONSTITUTIONAL. (See Constitution, 1.) 424.

FRAUD.

See STATUTE OF FRAUDS.

FRAUDULENT INTENT; SALE OF PERSONAL PROPERTY; KNOWLEDGE OF VENDOR. (See Sale, 3, 4.) 287.

GARNISHEE.

COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST OR FINE." (See Costs, 1.) 103.

GRAND JURY.

1. TESTIMONY OF GRAND JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR ACTS.—The testimony of grand jurors is not admissible to impeach their acts in finding an indictment. *State v. Hamilton*, 386.

DEPOSITIONS OF WITNESSES BEFORE GRAND JURY MUST BE INDORSED ON INDICTMENT. (See Indictment, 1.) 386.

HABEAS CORPUS.

1. HABEAS CORPUS—INQUIRY UPON.—A court is not authorized upon a writ of *habeas corpus* to inquire into the question of fact as to whether or not an indictment, regular upon its face, was ever found by the grand jury. *Ex parte Twohig*, 302.

2. IDEM—JUDGMENT OF CONVICTION.—A judgment of conviction in the district court, regular upon its face, is conclusive until reversed, and cannot be reviewed upon *habeas corpus*. *Id.*

HIGHWAY.

DUTY OF RAILROAD COMPANY. (See Railroads, 11.) 184.

HOMESTEAD.

1. HOMESTEAD—WHAT IT INCLUDES.—In construing the homestead law of 1865: *Held*, that a town lot upon which is erected a dwelling-house, two other buildings used as stores, and a stone house for storing goods, the buildings being separate from each other, can be claimed and held as a homestead; that the law exempts from execution a tract of land on which the homestead is located, to the extent of five thousand dollars in value, without limiting the other uses to which the land is put, as long as it is used and claimed as a homestead. *Smith v. Stewart*, 65.

2. HOMESTEAD LAW CONSTRUED—JOINT TENANCY.—In construing the homestead law of this state: *Held*, that when a declaration of homestead is filed, the property is held by the husband and wife as joint tenants, and that upon the death of either the homestead property vests absolutely in the survivor. (BEATTY, J., *dissenting*.) *Smith v. Shrieves*, 303.

3. IDEM.—WHEN NO DECLARATION IS FILED.—When no declaration has been filed upon the homestead property, no joint tenancy is created; in such case, if it was common property, one half vested in the wife upon the death of the husband, and the other half vested in the minor children of said deceased and his wife. *Id.*

4. **HOMESTEAD—PARTNERSHIP PROPERTY.**—A homestead cannot be carved out of land held and claimed by parties as copartners. *Terry v. Berry*, 515.

JUDGMENT FOR DEFICIENCY IN FORECLOSURE OF MORTGAGE IS NOT A LIEN ON HOMESTEAD PROPERTY. (See Mortgage, 2.) 439.

IMPOST.

COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST OR FINE." (See Costs, 1.) 103.

INDICTMENT.

1. **INDICTMENT—DEPOSITIONS OF WITNESS TO BE INDORSED ON.**—The names of witnesses whose depositions are read before the grand jury must be inserted at the foot of, or indorsed on, the indictment. (1 Comp. Laws, 1869.) *State v. Hamilton*, 386.
2. **MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA—WAIVER.**—By the provisions of sections 274-79 a motion to set aside the indictment must be made before demurrer or plea. If not so made, it will be deemed to have been waived. *Id.*

INDICTMENT REGULAR UPON ITS FACE IS NOT REVIEWABLE BY HABEAS CORPUS. (See Habeas Corpus, 2.) 302.

TESTIMONY OF GRAND JURORS WILL NOT BE RECEIVED TO IMPRACH THEIR ACTS. (See Grand Jury, 1.) 386.

INJUNCTION.

1. **INJUNCTION—WHEN SHOULD NOT BE ISSUED.**—An injunction should not be issued to enjoin a defendant from doing, upon the public domain, what the paramount law declares he may do (dig a ditch), when he is not insolvent or unable to pay all damages that may be done. (*Thorne v. Sweeney*, 12 Nev. 254, affirmed.) *Rivers v. Burbank*, 398.
2. **INJUNCTION—NOMINAL DAMAGES—COSTS.**—An appeal having been taken in this case from an order refusing to dissolve the temporary injunction, and that order having been reversed upon the ground that an injunction should not issue to prevent merely nominal damages (12 Nev. 251), and the court below having, upon the same facts, at the final trial, rendered judgment in favor of plaintiff for one dollar damages, for costs, and a perpetual injunction: *Held*, that the court erred in rendering judgment for costs, and decreeing a perpetual injunction. *Thorne v. Sweeney*, 415.

INLAND BILLS OF EXCHANGE.

See Bills of Exchange.

INSOLVENCY.

RIGHT OF STOPPAGE IN TRANSITU. (See Stoppage in Transitu, 1-4.) 376.
WHEN INJUNCTION SHOULD NOT BE ISSUED. (See Injunction, 1.) 398.

INSTRUCTIONS.

1. **WHEN NOT PREJUDICIAL.**—Where, upon appellant's own showing of facts, the judgment, if rendered in his favor, would have to be reversed: *Held*, that the instructions given by the court, even if erroneous and contradictory, could not have prejudiced the appellant. *Bishop v. Stewart*, 25.

2. **WHEN VERDICT WILL NOT BE SET ASIDE.**—A verdict ought never to be set aside simply because some expressions of the court, in its charge to the jury, might, in some particulars, when considered apart by themselves, be susceptible of verbal criticism which, when taken and considered with other portions of the charge, could not possibly have misled a jury of ordinary intelligence. *Solen v. V. & T. R. R. Co.*, 107.
 3. **REASONABLE CARE—DANGER—KNOWN DISPOSITION OF MEN.**—The court instructed the jury as follows: "In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger." *Held*, not prejudicial to the defendant. *Id.*
 4. **PLEADINGS—EVIDENCE.**—The instructions given by the court must be considered with reference to the pleadings and the evidence. The court is not required to instruct the jury upon any question not raised by the pleadings nor authorized by the evidence. *Schafer v. Gilmer*, 330.
 5. **STAGE PROPRIETORS—LIABILITY FOR INJURIES RECEIVED BY PASSENGERS.**—Proprietors of stage-coaches are liable for any injury that a passenger may receive on account of their negligence to furnish prudent, skillful, and sober drivers. *Id.*
 6. **IDEM—DUTY OF THE JURY.**—It is the duty of the jury to determine the nature and extent of the injuries received by the plaintiff as a passenger upon defendant's stage-coach, and to consider such injuries in making up their verdict. *Id.*
 7. **IDEM—PERJURY OF WITNESS.**—During the trial the court asked Wadleigh, the driver of the stage, this question: "Did the stage tip over that day between Robinson and Cherry Creek?" Wadleigh answered: "I swear positively that it did not." To the same question Schafer, the plaintiff, answered: "Yes, sir; I am positive it did." The court, of its own motion, instructed the jury as follows: "In this case there is plain perjury on one side or the other. Either the plaintiff, Henry Schafer, committed perjury, or the witness, Wadleigh, and one or the other of them ought to be in the penitentiary, instead of being in this court-room." *Held*, not erroneous. *Id.*
- REFUSAL OF AN INSTRUCTION ALREADY GIVEN IN SUBSTANCE BY THE COURT IS NOT ERROR.** (See Criminal Law, 6.) 18.
- CIRCUMSTANTIAL EVIDENCE—MEANING OF WORDS "ABSOLUTELY INCOMPATIBLE."** (See Criminal Law, 7.) 18.
- CIRCUMSTANCES OF SALE OF PERSONAL PROPERTY; INTENT OF PARTIES.** (See Sale, 2.) 242.
- REASONABLE DOUBT.** (See Criminal Law, 8.) 386.
- CRIME COMMITTED IN ONE COUNTY WHEN ONE OF DEFENDANTS IS IN ANOTHER COUNTY.** (See Criminal Law, 9-11.) 386.
- COURT CANNOT INSTRUCT JURY AS TO FACTS.** (See Criminal Law, 14.) 502.
- REMARKS OF COURT; WHEN EQUIVALENT TO INSTRUCTIONS.** (See Criminal Law, 15.) 502.
- REAL OR APPARENT FACTS.** (See Criminal Law, 16.) 503.
- MALICE; ASSAULT WITH INTENT TO KILL.** (See Criminal Law, 17.) 503.

INSURANCE.

TAX ON FOREIGN INSURANCE COMPANIES IS CONSTITUTIONAL. (See Constitution, 1.) 424.

ISLAND.

BOUNDARIES OF LAND; WATER-COURSES; ISLAND. (See Water Rights, 2, 3.) 261.

JOINT JUDGMENT.

MOTION TO SET ASIDE JOINT JUDGMENT AS TO ONE OF THE PARTIES. (See Jurisdiction, 1.) 268.

JOINT TENANCY.

HOMESTEAD LAW CONSTRUED. (See Homestead, 2, 3.) 303.

JUDGMENT.

FORM OR SUBSTANCE—RES ADJUDICATA.—A judgment should always be tested by its substance rather than its form. (HAWLEY, J.) Judgment in *Humboldt M. M. Co. v. Terry*, 11 Nev. 237: *Held*, to be *res judicata* as to the plaintiffs in that suit and all parties claiming under them. *Terry v. Berry*, 514.

NO APPEAL FROM JUDGMENT BY DEFAULT IN JUSTICE'S COURT. (See Appeal, 1.) 86.

FORM OF JUDGMENT IN ACTION FOR DIVERSION OF WATER. (See Water Rights, 1.) 251.

FORM OF JUDGMENT IN ACTION OF TROVER. (See Trover, 6.) 257.

JURISDICTION ON MOTION TO SET ASIDE JOINT JUDGMENT. (See Jurisdiction, 1.) 268.

JUDGMENT REGULAR UPON ITS FACE IS CONCLUSIVE UNTIL REVERSED. (See *Habeas Corpus*, 2.) 302.

EXISTENCE OF JUDGMENT CANNOT BE SHOWN BY PAROL. (See Parol Evidence, 1.) 421.

JUDGMENT FOR COSTS IN CRIMINAL ACTION MUST SPECIFY THE AMOUNT. (See Criminal Law, 12.) 429.

JUDGMENT FOR DEFICIENCY IN FORECLOSURE OF MORTGAGE IS NOT A LIEN ON HOMESTEAD PROPERTY. (See Mortgage, 2.) 489.

JUDGMENT BY DEFAULT.

NO APPEAL FROM JUDGMENT BY DEFAULT IN JUSTICE'S COURT. (See Appeal, 1.) 86.

EXCUSABLE NEGLIGENCE. (See Default, 1.) 195.

JURISDICTION.

JOINT JUDGMENTS, LAPSE OF TERM—MOTION TO SET ASIDE.—A joint judgment was entered against S. & M. M. alone moved to have it set aside as to him. The term lapsed before this motion was heard. At the hearing the court set aside the judgment as to M., whereupon the plaintiff moved to have the judgment also set aside as to the defendant S. This motion was granted: *Held*, that the court had jurisdiction upon the motion of M. to set the judgment aside as to both defendants. *Stevenson v. Mann*, 268.

JURISDICTION ON APPEAL FROM JUSTICE'S COURT. (See Appeal, 1.) 86.
CERTIORARI—WHEN ISSUED. (See Certiorari, 1.) 253.
CRIME COMMITTED IN ONE COUNTY WHEN ONE OF THE DEFENDANTS IS IN
ANOTHER COUNTY. (See Criminal Law, 9-11.) 336.

JURY.

DUTY OF JURY. (See Instructions, 6.) 330.

JUSTICE OF THE PEACE.

1. JUSTICE'S COURT—SUFFICIENCY OF COMPLAINT AND SUMMONS.—An account was filed in the justice's court against "Irving, McKay & Co.," the summons was returned served on "the defendants," and the judgment was entered by default: *Held*, that the complaint and summons were sufficient to sustain the judgment. *Martin v. District Court*, 85.
JURISDICTION ON APPEAL FROM JUSTICE'S COURT. (See Appeal, 1.) 86.
ISSUANCE OF EXECUTION A MINISTERIAL ACT. (See Certiorari, 2.) 253.

KNOWLEDGE.

OF VENDEE OF FRAUDULENT INTENT OF VENDOR IN SALE OF PERSONAL PROPERTY. (See Sale, 3, 4.) 287.
OF SUB-CONTRACTORS TO TERMS OF PRINCIPAL CONTRACT IMMATERIAL (See Contract, 6.) 427.
IMPARTED BY PLEADINGS. (See Pleadings, 5.) 472.

LAND.

TITLE TO, WHEN IMMATERIAL. (See Trover, 1.) 44.
CONDEMNATION OF. (See Railroads, 1.) 92.
BOUNDARIES OF. (See Water Rights, 2, 3.) 261.
SURVEY OF, RECORD OF. (See Survey, 1.) 398.
ACTUAL POSSESSION OF—MARKING OF BOUNDARIES. (See Possession, 2-4.) 399.

LEASE.

OF MINES REQUIRING ROYALTY. (See Mining Claims, 2.) 157.

LEGISLATURE.

CANNOT EXERCISE JUDICIAL POWER. (See Constitution, 2.) 439.

LICENSE.

PAROL LICENSE, WHEN ENFORCED. (See Parol License, 1.) 78.

LIEN.

CLAIMANTS—FORECLOSURE OF MORTGAGE. (See Mortgage, 1.) 351.
JUDGMENT FOR DEFICIENCY IN FORECLOSURE OF MORTGAGE IS NOT A LIEN ON
HOMESTEAD PROPERTY. (See Mortgage, 2.) 489.

LIMITATION.

PRESCRIPTIVE RIGHTS. (See Water Rights, 8.) 431.

MALICE.

ASSAULT WITH INTENT TO KILL. (See Criminal Law, 17.) 503.

MEASURE OF DAMAGES.

See DAMAGES.

MINING CLAIMS.

1. DAMAGES FOR EXTRACTING ORE FROM MINES.—COMPLAINT CONSTRUED.—The complaint in this case construed: *Held*, sufficient to support a judgment for damages as to the value of the ore in place in the mine, or its value after being separated from the mine. *Waters v. Stevenson*, 157.
2. *IDEM*—LEASE REQUIRING ROYALTY.—*Waters*, the plaintiff, leased certain mines to one Armstrong under an agreement that he should receive a royalty of from one dollar and fifty cents to two dollars and fifty cents, proportioned to the value of the ore, for each and every ton of ore extracted. During the existence of this lease, Stevenson, the defendant, claimed to have entered upon the leased mines in ignorance of the dividing lines thereof, and extracted therefrom certain quantities of ore, which he milled and converted to his own use. Armstrong subsequently assigned his lease to the plaintiff, *Waters*: *Held*, that the court did not err in refusing to charge the jury to include in the defendant's expenses, to be deducted from the gross yield of the ores, the amount per ton that Armstrong was obliged to pay plaintiff as royalty. That plaintiff's rights are just the same as Armstrong's would have been had he brought this action in his own name. *Id.*
3. *IDEM*—MEASURE OF DAMAGES.—*Held*, upon a review of the facts of this case, that the court erred in instructing the jury not to include in defendant's expenses, to be deducted from the gross yield of the ore, the necessary cost of mining the ores; that in all actions sounding in tort no fraud or culpable negligence appearing, the injured party is entitled to full compensation for his losses, and no more. *Id.*
4. MINING CLAIM—LOCATION OF, HOW MADE.—Under the laws of congress, the location of a mining claim, on a vein, must be made by taking up "a piece of land" to include the vein. (HAWLEY, C. J., *dissenting*.) *Gleeson v. Martin White*, 443.
5. BOUNDARIES.—The boundaries and extent of the claim must be plainly defined by stakes or marks on the ground. *Id.*
6. REASONABLE TIME TO DEFINE CLAIM.—The surface claim is not required to be defined immediately upon the discovery of the vein; the locator is allowed a reasonable time for that purpose. *Id.*
7. VEIN THE PRINCIPAL OBJECT.—The vein is the principal object of the locator; the surface claim ought always to conform to its course; the end lines ought to be parallel, and at right angles to the side lines. *Id.*
8. MARKING OF CENTER LINE OF SURFACE CLAIM.—Where the locators of a mine, having a monument, notice and work at the discovery point, post two stakes along the center line of the claim, one three hundred feet south-east of the location monument, marked "South-easterly stake of Paymaster," the other twelve hundred feet north-west of the location monument, and marked "North-westerly stake of Paymaster," these

stakes being in a line with the croppings of the vein and discovery point: *Held*, a sufficient marking of the boundaries of the location of the claim "so that its boundaries can be readily traced." *Id.*

9. LOCAL RULES AND REGULATIONS.—In order to secure the right of possession to a mining claim, there must be a compliance not only with the laws of the United States, but also with such local regulations of the mining district as are not in conflict therewith. *Id.*
10. SUFFICIENCY OF NOTICE AND OF LOCATION.—A notice of location, otherwise good, is not invalid because it does not contain a description of the claim by reference to some natural object or permanent monument; the law only requires that the record of the claim shall contain such description. It is a sufficient compliance with the law if the description of the *locus* of the claim is appended to the notice when it is recorded. *Id.*
11. CHANGING NAMES OF LOCATORS AFTER NOTICE HAS BEEN RECORDED.—Where the original notice of location was recorded, and afterwards changed by the erasure of one of the names of the locators and the insertion of another: *Held*, that the notice and record, as so changed, as to outsiders, was valid. *Id.*
12. CHANGING COURSE OF VEIN.—The notice as recorded was afterwards changed by striking out "westerly" and "easterly" as to the course of the vein, and inserting the words "northerly" and "southerly:" *Held*, the alteration having been made without any fraudulent intent, that the change was immaterial and did not vitiate the notice. *Id.*
13. ABANDONMENT—ESTOPPEL.—*Held*, that the changes as made in the notice of location after record did not show any intention on the part of the locators of the Paymaster mine to abandon it, and that the facts of this case do not present any question of estoppel. *Id.*

TAX ON PROCEEDS OF MINES IS COLLECTIBLE QUARTERLY. (See Taxes, 3.) 203.

TEN PER CENT. PENALTY IN DELINQUENT TAX SUITS DOES NOT APPLY TO PROCEEDS OF MINES. (See Taxes, 4.) 203.

CONTRACT FOR THE SALE OF ORE CONSTRUED. (See Contract, 3, 4.) 229.

TAX ON PROCEEDS OF MINES—DEDUCTION OF FIFTEEN DOLLARS PER TON. (See Taxes, 5.) 250.

MORTGAGE.

1. FORECLOSURE OF.—In a suit to foreclose a mortgage where the lien claimants are made parties to the suit, the court should determine, in its decree, the relative rights of the plaintiff and the several lien claimants. *Johnson v. Badger M. & M. Co.*, 351.
2. JUDGMENT FOR DEFICIENCY NOT A LIEN ON HOMESTEAD PROPERTY.—Where homestead property is sold under a foreclosure of mortgage, and afterwards redeemed by the vendee of the mortgage: *Held*, that the lien of the mortgage was satisfied by the sale and redemption of the property; that when the mortgage lien was satisfied the homestead rights attached, and that the judgment for the deficiency in the foreclosure suit did not create any lien against the real and beneficial estate in the land. *Martens v. Gilson*, 489.

PARTIES HAVING NO JOINT INTEREST AS PLAINTIFFS. (See Pleadings, 4.) 356.

DEED WHEN DECLARED TO BE A MORTGAGE. (See Deed, 4, 5.) 526.

MOTION

TO SET ASIDE JOINT JUDGMENT AS TO ONE DEFENDANT—LAPSE OF TERM. (See Jurisdiction, 1.) 268.

TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA. (See INDICTMENT, 2.) 386.

MUNICIPAL CORPORATIONS.

CLAIMS AGAINST MUNICIPAL CORPORATIONS. (See Constitution, 2.) 439.

NEGLIGENCE.

1. WHEN A QUESTION OF LAW OR FACT.—When the facts showing a want of ordinary care and prudence on the part of the plaintiff are clear and undisputed, the question of negligence is one of law, to be decided by the court; but when there is any doubt, or uncertainty; any question in regard to which reasonable men might honestly differ in opinion, then the question of negligence becomes a question of fact, and should be submitted to a jury. *Solen v. V. & T. R. R. Co.*, 107.

REASONABLE CARE AND DILIGENCE. (See Railroads, 3-6.) 106.

DEFAULT—EXCUSABLE NEGLIGENCE. (See Default, 1.) 195.

INJURIES CAUSED BY THE BREAKING OF A DITCH. (See Water Rights, 7.) 431.

NEW TRIAL.

VERDICT AGAINST EVIDENCE.—It is not the province of the appellate court to weigh the evidence in order to determine the preponderance thereof; that duty devolves upon the jury and the *nisi prius* court. If there is a substantial conflict in the evidence, this court will not disturb the verdict. *Solen v. V. & T. R. R. Co.*, 107; *Smith v. Mayberry*, 427.

POWER OF COURT TO GRANT A NEW TRIAL. (See Criminal Law, 3.) 17.

STATEMENT ON MOTION FOR A NEW TRIAL—WHEN NOT A STATEMENT ON APPEAL. (See Statement, 1.) 234.

STATEMENT ON MOTION FOR NEW TRIAL—WHEN STRICKEN OUT. (See Statement, 2.) 276.

DAMAGES—WHEN NOT EXCESSIVE. (See Damages, 1.) 330.

NONSUIT.

ACTION AGAINST RAILROAD COMPANY FOR PERSONAL INJURIES. (See Railroad, 2.) 106.

ADMISSIONS IN ANSWER AS TO AUTHORITY OF PRESIDENT OF CORPORATION. (See Pleadings, 6.) 486.

NOTICE.

NOTICE OF LOCATION OF MINING CLAIMS, 10-12 443.

OBJECTIONS.

1. OBJECTIONS TO—WHERE AND HOW MADE.—The supreme court, on appeal, will consider objections to the admission of evidence, only upon the grounds of objection as specified in the court below. *Gooch v. Sullivan*, 78.

2. **WHEN MUST BE MADE IN THE COURT BELOW.**—Technical objections to the introduction of papers or to the form of an order, which could readily have been cured if taken in the court below, will not be considered for the first time in the appellate court. *State v. C. V. & C. M. Co.*, 195.

WAIVER OF OBJECTIONS TO FORM OF PLEADINGS. (See Pleadings, 7.) 492.

OFFICE AND OFFICER.

WHEN SIGNATURE OF OFFICER TO TAX CERTIFICATE MUST BE PROVEN. (See Taxes, 1.) 45.

ORDERS.

ORDERS OF COURT MADE ON SUNDAY. (See Sunday, 1.) 18.

ORDERS IN FORM OF AN INLAND BILL OF EXCHANGE—NOT AN ASSIGNMENT OF FUNDS.

ORE.

DAMAGES FOR EXTRACTING ORE FROM MINES. (See Mining Claims, 1, 3.) 157.

CONTRACT FOR THE SALE OF ORE CONSTRUED. (See Contract, 3, 4.) 229.

PAROL EVIDENCE.

1. **DEFENSE TO PROMISSORY NOTE.**—The defendant claimed that the consideration of the note sued on was the sale of certain timber and other property, and offered by parol testimony to show that the timber was lost in an action at law to determine the right of property therein: *Held*, that the fact of such a suit or the judgment therein, could not be proved by parol. *Davis v. Noteware*, 421.

WHEN PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN DEED. (See Deed, 2, 3.) 515.

PAROL LICENSE.

1. **WHEN ENFORCED.**—A parol agreement to construct a ditch and keep it in repair, for the mutual benefit of several parties, will be enforced, if the parties have, in pursuance of such agreement, performed labor and paid their share of the expenses incurred in the construction of the ditch. *Gooch v. Sullivan*, 78.

PARTIES.

MOTION TO SET ASIDE JOINT JUDGMENT AS TO ONE OF DEFENDANTS—LAPSE OF TERM. (See Jurisdiction, 1.) 268.

PARTIES HAVING NO JOINT INTEREST AS PLAINTIFFS. (See Pleadings, 4.) 356.

PARTNERSHIP.

1. **PARTNERS—WHEN ACTION BETWEEN, MAY BE SUSTAINED AT LAW.**—An action at law by one partner against another to recover a balance due on settlement of accounts can be maintained if there has been a balance found and agreed upon between the partners. *Wicks v. Lippman*, 499.

2. **IDEM.**—Where the adjustment of the matters in controversy does not involve the settlement of any partnership accounts, the action at law can be maintained. *Id.*

SURVIVING PARTNERS ARE NOT THE REPRESENTATIVES OF A DECEASED PARTNER.—(See Practice Act, 1.) 297.

HOMESTEAD CANNOT BE CARVED OUT OF PARTNERSHIP PROPERTY. (See Homestead, 4.) 515.

PENALTIES.

SUIT FOR DELINQUENT TAX AND PENALTY—CAUSE OF ACTION. (See Taxes, 6.) 286.

WITHDRAWAL OF PENALTIES NOT A DISMISSAL OF THE ACTION. (See Taxes, 7.) 286.

PERJURY.

PERJURY OF WITNESS. (See Instructions, 6.) 330.

PERSONAL PROPERTY.

VERBAL CONTRACT BY VENDEE TO PAY DEBTS OF VENDOR. (See Contracts, 1.) 25.

CONVERSION OF PERSONAL PROPERTY. (See Trover, 2, 4.) 45.

SALE OF, FOR TAXES. (See Taxes, 2.) 45.

TITLE TO, WHEN NOT EFFECTED BY THE DECLARATIONS OF THE ASSIGNEE OF A CONTRACT. (See Declarations, 1.) 45.

SALE OF, CHANGE OF POSSESSION. (See Sale, 1.) 242.

SALE OF, WHEN VOID. (See Sale, 3.) 286.

PRESUMPTION AS TO OWNERSHIP OF. (See Presumptions, 1.) 395.

TITLE TO—DECLARATIONS OF OWNER. (See Title, 1.) 395.

WHEN DEMAND IS NOT NECESSARY. (See Demand, 1.) 395.

POSSESSION OF, IS PRIMA FACIE EVIDENCE OF OWNERSHIP. (See Possession, 1.) 395.

PHYSICIAN.

WARDEN OF STATE PRISON IS AUTHORIZED TO EMPLOY PHYSICIAN. (See Statutes, 1.) 418.

PLEADINGS.

1. PUBLIC STREET—DENIALS IN ANSWER.—The tract of defendants runs along E street in Virginia city. The complaint alleges in positive terms that this was "a public street of said city; the answer denies that the plaintiff was rightfully or lawfully walking on its track at the time of the injury, or that the public were accustomed to walk thereon, or that they had any right so to do:" *Held*, that these averments in the answer did not constitute a denial of the allegation in the complaint that defendant's track was on a public street. *Solen v. V. & T. R. R. Co.*, 107.
2. PLEADINGS CONSTRUED LIBERALLY.—The rule of construing pleadings most strongly against the pleader has been changed by the statute of this state which provides that, for the purpose of determining its effect, a pleading shall be liberally construed. 1 Comp. Laws, sec. 1133; *Ferguson v. V. & S. R. R. Co.*, 184.
3. COMPLAINT ON INDEMNITY BOND.—Roeder brought an attachment suit against Guertin. Travis, as sheriff, levied the attachment upon certain personal property. Gaudette gave Travis notice that he owned the property. Roeder required the sheriff to retain said property, and gave him an indemnifying bond, with Glissan and Sultan as sureties. The property was retained by the sheriff, who afterwards sold the same at sheriff's sale, under execution in the suit of *Roeder v. Guertin*. Gaudette

brought an action against Travis, to recover the said personal property or its value, and obtained judgment. An execution was issued upon this judgment, and returned unsatisfied. No part of the judgment has been paid. The bond of indemnity was assigned to Gaudette by the sheriff. Gaudette brought this action against Roeder, Glissan and Sultan to recover the amount due on his judgment against Travis: *Held*, that a complaint properly alleging these facts stated a good cause of action. *Gaudette v. Roeder*, 341.

4. PARTIES HAVING NO JOINT INTEREST AS PLAINTIFFS.—In a suit to foreclose a mortgage, it appearing that plaintiffs had no joint or common interest in the money advanced upon the mortgage: *Held*, that these facts should have been alleged in the complaint, and that the decree should be made to conform therewith. *Higgs v. Hanson*, 356.
5. KNOWLEDGE IMPARTED BY.—A party cannot be presumed to be apprised of any facts by the pleading of his adversary except those stated therein and such others as follows therefrom. *Estis v. Simpson*, 472.
6. ADMISSIONS IN ANSWER.—Plaintiff testified that he was employed by one Hewson, who claimed to be the president of the defendant; the answer was verified by Hewson as defendant's president, and admitted that plaintiff went into defendant's employ, etc.: *Held*, that such admissions and proofs were *prima facie* evidence that Hewson was authorized to employ the plaintiff, and that the court did not err in refusing a nonsuit. *Steel v. Solid Silver G. & S. M. Co.*, 486.
7. WAIVER OF OBJECTIONS TO FORM.—Objection to the form of a complaint are waived by a failure to demur. *Richardson v. Hooke*, 492.
8. *IDEM*.—A complaint alleging that plaintiff is a sub-contractor for the erection of the walls of a State prison, and responsible for the labor thereon; that defendant (the architect for the state) had, pursuant to an agreement with plaintiff and the principal contractor, received from the state, for the use and benefit of plaintiff, the sum of fifteen thousand dollars, and had only paid out on plaintiff's account ten thousand dollars, and refused to pay over or account for the remaining five thousand dollars; states facts sufficient to constitute a cause of action. *Id.*

PLEADINGS IN JUSTICE'S COURT. (See Justice of the Peace, 1.) 85.

COMPLAINT FOR EXTRACTING ORE FROM MINES, CONSTRUED. (See Mining Claims, 1.) 157.

PRIVATE WAY—SUFFICIENCY OF COMPLAINT IN ACTION FOR PERSONAL INJURIES. (See Railroads, 9, 10.) 184.

FORM OF VERDICT IN ACTION OF TROVER. (See Trover, 6.) 257.

WHEN SAME CAUSE OF ACTION MAY BE SEVERED. (See Taxes, 6.) 286.

SUIT FOR DELINQUENT TAX AND PENALTIES. (See Taxes, 6.) 286.

INSTRUCTIONS—EVIDENCE. (See Instructions, 4.) 330.

ESTOPPEL MUST BE PLEADED. (See Estoppel, 1.) 395.

PLEADING PRESCRIPTIVE RIGHT. (See Water Rights, 7.) 431.

PLEA.

MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA. (See Indictment, 1.) 386.

POSSESSION.

1. **PRIMA FACIE EVIDENCE OF OWNERSHIP.**—The mere possession of personal property is only *prima facie* evidence of ownership, and will not protect the purchaser buying on the faith of such possession against the claims of the true owner. *Hansen v. Chiatovich*, 395.
2. **DEED TO ENTIRE TRACT.**—The rule that actual possession of land may be had without fences or inclosures, by proving that a party lives upon and cultivates a portion of it, and holds a deed to the whole tract, does not apply to a case where a party enters upon the land, knowing it to be a part of the public domain, and that his deed was inoperative to convey any title. (*Eureka M. & S. Co. v. Way*, 11 Nev. 171, affirmed.) *Rivers v. Burbank*, 399.
3. **WANT OF DILIGENCE.**—Where the plaintiff testified that he inclosed the land as rapidly as he was able; but failed to show any act or effort of his in this behalf for a period of two years: *Held*, upon a review of all the facts, that plaintiff failed to show that he proceeded with reasonable diligence to subject the land to his dominion or control. *Id.*
4. **MARKING OF BOUNDARIES.**—The land claimed was agricultural or grazing land; it had been used as a common for grazing purposes without objection; there was no inclosure of any portion of the land upon which the ditch of defendants was dug; on one side of the land, posts, two rods apart, had been set; on another side post-holes were dug the entire distance, posts were set a part of the way and scattered upon the ground; on the remaining part, for long distances, the post-holes were filled up, and there were few, if any, signs of a marked boundary. At one place there was a distance of forty rods with no boundary line except a ditch belonging to defendants, while the next forty rods had no boundary but a public road. In the whole eighty rods there was not a post-hole, post, or fence of any character: *Held*, that this testimony was wholly insufficient to create any possessory right to the land. *Id.*

CHANGE OF POSSESSION—SALE OF PERSONAL PROPERTY. (See *Sale*, 1.) 242.
GOODS IN TRANSIT. (See *Stoppage in transitu*, 4.) 376.

SURVEYS OF LANDS MUST BE RECORDED TO BE EVIDENCE OF POSSESSION. (See *Survey*, 1.)

CUSTOM AS TO POSSESSION OF LANDS IS NOT ADMISSIBLE. (See *Custom*, 1. 399.

PRACTICE ACT.

1. **SECTION 379 CIVIL PRACTICE ACT CONSTRUED.**—In construing the provisions of section 379 of the civil practice act: *Held*, that the defendant Gloster was properly allowed to testify in his own behalf against the plaintiffs, who are the surviving partners of J. J. Hayes, deceased, to a contract made with Hayes previous to his death; that the plaintiffs, as surviving partners of said Hayes, are not the "representatives of a deceased person." *Crane v. Gloster*, 279.
2. **COMPETENCY OF WITNESSES.**—Where the administrator of a deceased person is plaintiff, and testifies to a contract made by the deceased person with the defendant in his presence: *Held*, that under the provisions of section 379 of the civil practice act, Stat. 1877, 160, the defendant could not testify in his own behalf. This provision of the statute criticised. *Vesey v. Benton*, 284.

3. SURETIES—BOND OF INDEMNITY.—In construing the provisions of section 591 of the civil practice act (1 Comp. L. 1651): *Held*, that the provisions of said section could only be invoked by the sheriff; that an order substituting the sureties as defendants in place of the Sheriff was utterly null and void. *Gaudette v. Roeder*, 341.
4. COMPETENCY OF WITNESS—INCIDENTAL OR MATERIAL FACTS—Where a witness is disqualified, under the provisions of section 379 of the civil practice act, he is a competent witness to testify to incidental and preliminary matters addressed solely to the judge, but cannot testify to any of the issues raised by the pleadings. *Higgs v. Hanson*, 356.
5. *IDEM*—AGENCY.—The plaintiff was permitted to testify that he was the agent of defendant's intestate during his life-time, and was authorized by him to draw certain bank checks: *Held*, that the agency of Higgs was a material fact to be decided by the jury, and that the court erred in admitting the testimony, the witness Higgs not being a competent witness under the provisions of section 379. *Id.*

PROVISIONS CITED.

- Section 35. Service of summons, 274.
 Section 70. Pleadings liberally construed, 191.
 Section 123. Attachment lien, 347.
 Section 139. Undertaking on attachment, 301.
 Section 197. Statement on motion for new trial, 235, 239, 490-1.
 Section 332. Statement on appeal, 236, 240.
 Sections 376-9. Competency of witness, 280-5, 357.
 Section 591. Sureties on bond of indemnity, 348.

(See Statutes—"Compiled Laws Cited.")

PRELIMINARY EXAMINATION.

STATEMENT OF DEFENDANT. (See Criminal Law, 4.) 17.

DEPOSITION ON PRELIMINARY EXAMINATION; IMPEACHMENT OF WITNESS.)
 (See Criminal Law, 13.) 502.

PRESCRIPTIVE RIGHTS.

PLEADING PRESCRIPTIVE RIGHTS. (See Water Rights, 8.) 431.

PRESUMPTION.

1. AS TO OWNERSHIP OF PROPERTY.—When personal property is shown to be the property of a party prior to his death: *Held*, that the law would presume in the absence of any evidence to the contrary, that it continued to be his up to the time of his death. *Hanson v. Chiatovich*, 395.

PRESUMPTION THAT PROPER SIGNALS WILL BE GIVEN ON RAILROADS. (See Railroads, 6.) 107.

WHEN FINDINGS OF FACT WILL BE PRESUMED. (See Findings, 3.) 376.

KNOWLEDGE IMPARTED BY PLEADINGS. (See Pleadings, 5.) 472.

STATEMENT NOT CONTAINING ALL THE EVIDENCE. (See Statement, 4.) 514.

PRINCIPAL AND AGENT.

COMPETENCY OF WITNESS. (See Practice Act, 5.) 356.

CONSIDERATION OF NOTE GIVEN BY AGENT TO PRINCIPAL; WHEN SUFFICIENT.
(See Bills and Notes, 1.) 472.

PRIVATE WAY.

ACTION FOR PERSONAL INJURIES. (See Railroads, 9.) 184.

PROMISSORY NOTES.

See BILLS AND NOTES.

QUESTION OF LAW OR FACT.

See NEGLIGENCE, 1. 107.

RAILROADS.

1. CONDEMNATION OF LAND, TITLE TO COMPENSATION.—Lynch had the possessory title to certain land, including land that was laid down on the official maps of Virginia city, but never opened to the public as a street. The railroad company obtained from the city the right of way to lay its track upon said street, and in so doing excavated it in such a manner as to render the access to his dwelling-house difficult, and entirely destroyed a public road leading across said street to a quartz mill owned by him; *Held*, that it was immaterial whether the title in fee was in the United States or in Virginia city in trust for the public, that the prior possessory rights which Lynch had acquired by possession could not be destroyed by the railroad company without compensation. *V. & T. R. R. Co. v. Lynch*, 92.
2. ACTION AGAINST RAILROAD COMPANY—DAMAGES FOR PERSONAL INJURIES—NONSUIT.—S. was walking on his regular route from his work at the Ophir mine, along the track of the V. & T. R. R. Co., on a public street, much frequented by foot passengers in Virginia city; there was no sidewalk or passage-way provided along the street; there was a heavy snow storm with such high winds as to prevent his seeing more than ten feet ahead of him; there was snow on the rails which deadened the sound of the engine or train on the track; he was at a place where it was the usual custom of the railroad company when moving its trains or locomotives to give signals either by the whistle of the locomotive, or the ringing of the bell; he was looking ahead whenever he could and was listening for the sound of the whistle or bell, which he could have heard if such signals had been given; none was given; he was, without any warning, knocked down by a locomotive or tender backing along the track near a regular crossing; *Held*, that upon this statement of plaintiff's case, the court did not err in refusing to grant a nonsuit. *Solen v. V. & T. R. R. Co.*, 106.
3. *IDEM*—DUTY OF PLAINTIFF.—A plaintiff is bound to use due and reasonable diligence, and to exercise ordinary care and prudence he must use his ordinary faculties in protecting himself from danger, and if he fails to use his eyes or ears, having the opportunity and ability so to do, then the court is authorized to grant a nonsuit upon the ground of contributory negligence. *Id.*

4. **IDEM—DEGREE OF DANGER.**—The plaintiff's prudence is to be measured in proportion to the danger. The greater the risk the greater the degree of care required. *Id.*
5. **IDEM—DUTY OF DEFENDANT.**—A railroad company, when moving its locomotives or trains upon the public streets of a city, is bound to use due care and give some signal of their approach. *Id.*
6. **IDEM—PRESUMPTION THAT SIGNALS WILL BE GIVEN.**—A person walking along a track on a public street, in a city, has a right to presume, and act on the belief, that the railroad company will not move its locomotives or cars along such track without giving the usual signals. *Id.* 107.
7. **IDEM—DAMAGES WHEN NOT EXCESSIVE.**—The plaintiff was thirty-four years of age, a miner by occupation; by the accident his right shoulder and some of his ribs were broken; one of his legs had to be amputated; he had severe pains through his breast and sides; was confined to his bed five or six weeks; his right shoulder and arm were disabled. He has no means of support except by his personal labor: *Held*, that the verdict of fifteen thousand dollars is not so excessive as to indicate passion or prejudice upon the part of the jury. *Id.*
8. **IDEM—RULE OF DAMAGES.**—The court instructed the jury as follows: "In cases of this character the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury: *Held*, not erroneous. *Id.*
9. **PRIVATE WAY.**—A complaint charging a railroad company with negligence in failing to keep in repair a private way, over its railroad tract, constructed for its own use and benefit, and used by other persons by the mere license of the railroad company, does not state facts sufficient to constitute a cause of action. *Ferguson v. V. & T. R. R. Co.*, 184.
10. **IDEM.**—In actions of this character, to enable a plaintiff to maintain his action, he must allege and prove some act of *misfeasance* on the part of the railroad company. *Id.*
11. **IDEM—PUBLIC HIGHWAY.**—The railroad company could only be held responsible for the injuries plaintiff received upon the theory that the street where the accident occurred was a public highway prior to the construction of the railroad. In such event it would be the duty of the railroad company to keep it in repair. *Id.*

REASONABLE CARE.

See RAILROADS, 3-6. 106-7.

REASONABLE DOUBT.

INSTRUCTIONS. (See Criminal Law, 8.) 386.

RECORD.

RECORD IN CRIMINAL CASE. (See Criminal Law, 1.) 17.

FINDINGS NO PART OF THE RECORD. (See Findings, 1.) 84.

STATEMENT ON MOTION FOR NEW TRIAL; WHEN STRICKEN OUT. (See Statement, 2.) 276.

RECORDER.

POSSESSION OF LAND; RECORD OF SURVEYS. (See Survey, 1.) 398.

RECORDING NOTICE OF LOCATION OF MINING CLAIM. (See Mining Claims, 11, 12.) 443.

REMARKS OF THE COURT.

WHEN EQUIVALENT TO INSTRUCTIONS. (See Criminal Law, 15.) 502.

RES ADJUDICATA.

See JUDGMENT.

RIGHT OF WAY.

TITLE TO AND CONDEMNATION OF LAND. (See Railroads, 1.) 92.

DAMAGES FOR RIGHT OF WAY IN CONSTRUCTING WATER DITCH. (See Water Rights, 2, 3.) 261.

ROBBERY.

CRIME COMMITTED IN ONE COUNTY WHEN ONE OF DEFENDANTS IS IN ANOTHER COUNTY; PRINCIPAL OR ACCESSORY BEFORE THE FACT. (See Criminal Law, 9-11.) 386.

RULES OF COURT.

ARGUMENT OF COUNSEL. (See Attorney, 1.) 203.

SALE.

1. PERSONAL PROPERTY—STATUTE OF FRAUDS.—Upon a review of the facts: *Held*, that the change of possession of the personal property sold by K. on behalf of J. & K. to plaintiff, was not sufficient, as against creditors, to satisfy the statute of frauds. *Thomas v. Sullivan*, 242.
2. IDEM—INSTRUCTIONS.—*Held*, that the court erred in refusing to give the following instructions to the jury: "In making up your minds on the validity of the sale claimed by plaintiff, you should take into consideration all the circumstances surrounding the same; the situation of the parties; the solvency or insolvency of Jones & Kimerley; whether Thomas was acquainted with their circumstances, or believed or had reason to believe them in debt; the character of the notes given; that they were payable only to one of the firm; whether the trade was within the legitimate business of the partnership business, and the action of the parties; and if, from all you believe, the sale was not in good faith, and for a valuable consideration, you will find a verdict for defendant." *Id.*
3. SALE OF, WHEN VOID.—When a sale of personal property is made by the vendor with the intent to hinder, delay and defraud his creditors, and the purchaser has knowledge of such intention, the sale is void. *Greenwell v. Nash*, 286.
4. IDEM.—In determining the question whether the vendee had knowledge of the fraudulent intent of the vendor, the jury should take into consideration the acts and declarations of the respective parties, and all the facts and circumstances surrounding the sale, and if the knowledge of the purchaser is sufficient to put him upon inquiry, then the jury would have the right to infer knowledge upon his part of the fraudulent character of the transaction. *Id.*

VERBAL CONTRACT BY VENDEE TO PAY DEBTS OF VENDOR. (See Contract, 1.) 25.

SALE OF PERSONAL PROPERTY FOR TAXES. (See Taxes, 1, 2.) 45.

SET-OFF.

See COUNTER-CLAIM.

STAGE PROPRIETORS.

LIABILITY FOR INJURIES RECEIVED BY PASSENGERS. (See Instructions, 5.) 330.

STATEMENT.

1. ON MOTION FOR NEW TRIAL.—In construing the provisions of the civil practice act (secs. 197, 332, 333, 335-6): *Held*, that when an appeal is only taken from a judgment, a statement that had been prepared and used as a statement on motion for a new trial, cannot be considered as a statement on appeal. (Beatty, J., dissenting.) *Williams v. Rice*, 234.
2. WHEN STRICKEN OUT.—A statement which is not authenticated as required by statute, constitutes no part of the record of the case on appeal, and upon motion will be stricken out. *Solomon v. Fuller*, 276.
3. IDENTIFICATION OF DOCUMENTS.—The statement reads: "The agreed statement of facts, findings of the court, are hereby referred to, and made the statement on motion for new trial." *Held*, that the fact that such papers were in the transcript entitled in this suit, the statement of facts signed by respective counsel, and findings of fact by the district judge and referred to as above, was a sufficient identification to authorize this court to examine them. (Hawley, C. J., dissenting.) *Martens v. Gilson*, 489.
4. NOT CONTAINING ALL THE EVIDENCE—FINDINGS OF FACT.—Where the statement fails to show that it contains all the evidence, the appellate court will presume that there was sufficient evidence at the trial to sustain the findings of the court. *Terry v. Berry*, 514.

AGREED STATEMENT OF FACTS TAKE THE PLACE OF FINDINGS. (See Findings, 2.) 296.

DOCUMENTARY EVIDENCE MUST BE EMBODIED IN A STATEMENT. (See Findings, 4.) 395.

STATE PRISON.

WARDEN AUTHORIZED TO EMPLOY PHYSICIAN. (See Statutes, 1.) 418.

STATUTE OF FRAUDS.

SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION. (See Sale, 1.) 242.

STATUTES.

1. STATE PRISON—WARDEN TO EMPLOY PHYSICIAN.—In construing the acts to provide for the government of the state prison (Statutes 1877, 66): *Held*, that the authority to employ a physician is vested in the warden under the clause conferring upon him the power to appoint "all necessary help." *State ex rel. Fox v. Hobart*, 418.

STATUTES CITED.

- | | |
|----------------|--------------------------------|
| 1861. Page 24. | Homestead law, 68-77, 308-329. |
| " " 267. | Surveys and surveying, 405-6. |
| 1864-5. " 77. | Competency of witness, 280. |

| | | | |
|----------------------|------|-----------|--------------------------------------------------------|
| 1864-5. | " | 225. | Homestead exemption, 68-77. |
| " | " | 282. | Revenue act—Taxes, 223. |
| " | " | 325. | Claim against Virginia city, 440. |
| " | " | 343-4. | Possession of land—Surveys, 405, 409. |
| " | " | 427. | Incorporation of railroad companies, 94. |
| 1866. | " | 172. | Revenue act—Taxes, 223. |
| 1867. | " | 44. | Costs of criminal action, 430. |
| 1871. | " | 135. | Selection and sale of lands, 264. |
| 1873. | " | 18. | Board of State Prison commissioners, 420. |
| " | " | 169-70. | Revenue act—Taxes, 223. |
| 1877. | " | 66. | Board of State Prison commissioners, 420. |
| COMPILED LAWS CITED. | | | |
| Vol. 1. | Sec. | 3, 4. | Judicial business, 212-4. |
| " | " | 14. | Bills of exchange, 373. |
| " | " | 186. | Homestead law, 309. |
| " | " | 235. | Certificate of acknowledgment, 353. |
| " | " | 336-8. | Notary public, 215. |
| " | " | 955. | Orders of court on Sunday, 23. |
| " | " | 1104. | Demurrer, 187. |
| " | " | 1110. | Counter-claim, 423. |
| " | " | 1131. | Excusable neglect, 202. |
| " | " | 1133. | Pleadings liberally construed, 191. |
| " | " | 1192. | Complaint, 165. |
| " | " | 1193. | Garnishee, 105. |
| " | " | 1256. | Awarding damages, 137. |
| " | " | 1258. | Statement on motion for new trial, 235, 396, 416, 523. |
| " | " | 1280. | Issuance of execution, 256. |
| " | " | 1391. | Appeal from judgment, 278. |
| " | " | 1393. | Statement on appeal, 236. |
| " | " | 1396. | Certificate to statement, 523. |
| " | " | 1402-3-8. | Undertaking on appeal, 210-212. |
| " | " | 1440. | Competency of witnesses, 285. |
| " | " | 1539. | Costs, 417. |
| " | " | 1568. | Entitling affidavits, 202. |
| " | " | 1575. | Complaint, justice's court, 88. |
| " | " | 1577. | Summons, 89. |
| " | " | 1595-9. | Complaint, 88, 91. |
| " | " | 1618. | Transcript of judgment, 256. |
| " | " | 1623. | Justice's docket, 91. |
| " | " | 1643-4. | Appeal from justice's court, 90, 91. |
| " | " | 1652. | Sureties on bond of indemnity, 348. |
| " | " | 1658. | Pleading, justice's court, 89. |
| " | " | 1673. | Judgment, 89. |
| " | " | 1719. | Accessory before the fact, 390. |
| " | " | 1780-4-6. | Preliminary examination, 21. |
| " | " | 1838-9. | Testimony of grand jurors, 389. |
| " | " | 1853. | Indorsement upon indictment, 388. |
| " | " | 1876. | Accessory before the fact, 391. |
| " | " | 1899. | Indorsement upon indictment, 388. |

| | | | |
|---------|------|--------------------|-------------------------------------------------|
| Vol. 1. | Sec. | 1948. | Challenge to petit jury, 389. |
| " | " | 2043. | Recording verdict, 23. |
| " | " | 2075. | Record in criminal case, 20. |
| " | " | 2316. | Accessory before the fact, 391. |
| Vol. 2. | Sec. | 2773. | Attorney-general, control of tax suits, 210-12. |
| " | " | 2968. | Indemnity bond, 346. |
| " | " | 3128-9, 3148-54-5. | Taxes, real and personal property, 221. |
| " | " | 3228. | Costs in criminal action, 430. |
| " | " | 3233. | Taxes, 222. |
| " | " | 3238-46-50-54. | Taxes on proceeds of mines, 215-18. |
| " | " | 3442. | Railroad company—Highways, 192. |
| " | " | 3445. | Condemnation of land, 102. |
| " | " | 3466. | Railroad company to ring its bell, 122. |
| " | " | 3857. | Town site act, 522. |
| " | " | 3947. | Foreign insurance companies, 426. |

STATUTES UNITED STATES.

Town site act, 66.

Vol. 14. Page 253. Water ditches—Right of way, 264, 268.

REVISED STATUTES UNITED STATES.

| | |
|---------------------|-----------------------------------|
| Sections 2319-2325. | Mining claims, 453-471. |
| " 2239. | Water ditches; Right of way, 402. |
| " 2382. | Town site act, 100. |
| " 2385. | Pre-emption, 101. |

STOCKHOLDERS.

INJURIES CAUSED BY THE BREAKING OF A DITCH—CONTRIBUTORY NEGLIGENCE. (See Water Rights, 7.) 431.

CAN BRING SUIT FOR DAMAGES AGAINST CORPORATION. (See Corporation, 1.) 431.

STOPPAGE IN TRANSITU.

1. RIGHT OF.—To enable the vendor of personal property to exercise the right of stoppage *in transitu*, the goods sold must be unpaid for, the vendee must be insolvent, and the goods must be in transit. *More v. Lott*, 376.
2. MATERIAL TESTIMONY.—Any testimony which tends to show the ownership and right of possession of the goods in plaintiff, is admissible in evidence. *Id.*
3. INSOLVENCY OF VENDEE.—Any well-founded information of an embarrassment or failure on the part of the vendee to meet the demands of his creditors, is sufficient insolvency to justify the vendor in stopping the goods sold. *Id.*
4. IN TRANSIT.—Goods are in transit so long as they are on the passage, and until they come into the actual or constructive possession of the vendee, or of some person acting for him. *Id.*

STREET.

PUBLIC. (See Pleadings, 1.) 107.

SUMMONS.

SUFFICIENCY OF, IN JUSTICE'S COURT. (See Justice of the Peace, 1.) 85.

SUNDAY.

1. ORDERS MADE ON.—The provisions of the statutes of this state (1 Comp. L. 955) authorizing the court to "receive a verdict or discharge a jury," carries with it the power to have the verdict recorded, and authorizes the court to make such orders as may be incident to the power given, such as designating a day when it would pronounce judgment upon the verdict. *State v. Rover*, 18.

UNDERTAKING ON APPEAL EXECUTED ON. (See Appeal, 3.) 203.

SURETIES.

WHEN, ARE NOT LIABLE ON UNDERTAKING TO PREVENT LEVY OF ATTACHMENT. (See Attachment, 1.) 296.

BOND OF INDEMNITY. (See Practice Act, 3.) 341.

SURVEY.

1. POSSESSION OF LANDS.—In construing the act to regulate surveyors and surveying, (Stat. 1861, 267; Stat. 1864-5, 344): *Held*, that the surveys of land to be evidence of possession must be filed for record within the time provided by statute, and that the burden of proof was upon the plaintiff to show that they were so recorded. *Rivers v. Burbank*, 398.

TAXES.

1. CERTIFICATE OF SALE—SIGNATURE MUST BE PROVEN.—It is essential to the validity of a certificate of sale, executed by an officer of another state, that it be shown that the person signing it is the officer authorized by the laws of that state to execute it, and that his signature thereto is genuine. *Ward v. Carson River Wood Co.*, 45.
2. SALE OF PROPERTY FOR.—Where property is sold for taxes in a summary manner, without any regular proceedings in a court of justice, it is essential that all the requirements of the law should be strictly complied with. *Id.*
3. TAX ON PROCEEDS OF MINES.—In construing section ten of the act providing for the taxation of the net proceeds of mines (2 Comp. Laws, 3254): *Held*, that there is nothing in said section to prevent the collection of such taxes quarterly. (*State v. Eureka Con. M. Co.*, 8 Nev. 16, affirmed.) *State v. Cal. M. Co.* 203; *State v. C. V. M. Co.*, 228.
4. TEN PER CENT. PENALTY.—In construing the various sections of the revenue law relating to the collection of delinquent taxes: *Held*, that the per centum penalty imposed by section twenty-four (2 Comp. Laws, 3148), does not apply to suits brought for the collection of delinquent taxes on the proceeds of mines, and that such percentage is not imposed or authorized by section one of the act prescribing an additional penalty for non-payment of taxes. (2 Comp. Laws, 3228.) (*HAWLEY, C. J.*, dissenting.) *State v. Cal. M. Co.*, 203; *State v. C. V. M. Co.*, 228.

5. DEDUCTION OF FIFTEEN DOLLARS PER TON.—The mine-owner working his ores under the Freiburg process is not entitled to an exemption of fifteen dollars per ton in addition to the actual cost of working the ore. (*State v. Eureka Con. M. Co.*, 8 Nev. 15, affirmed.) *State v. Northern Belle M. & M. Co.*, 250.
6. SUIT FOR DELINQUENT TAXES AND PENALTIES.—The complaint in this action shows that an action was commenced by the state to recover the delinquent taxes and penalties due on the proceeds of defendant's mine, and thereafter, while said suit was pending and undetermined, the plaintiff, at the instance and by the consent of the defendant, in open court withdrew from the consideration of the court the question of plaintiff's right to recover the penalties in addition to said tax, without prejudice to plaintiff's right to bring an action for said penalties; that thereafter plaintiff brought this suit to recover said penalties: *Held*, upon a demurrer to said complaint, that this action might, although a part of the same cause of action, under the special facts alleged, be maintained for the penalties. *State v. Cal. M. Co.*, 286; *State v. Con. Vir. M. Co.*, 296.
7. WITHDRAWAL OF PENALTIES NOT A DISMISSAL OF THE ACTION.—*Held*, that the complaint in this action does not show that the former action was dismissed, and that the demurrer upon the ground that there is another action pending for the same cause of action is well taken. *Id.*
8. PERCENTAGE OF DISTRICT ATTORNEY.—*Held*, that the district attorney is entitled to five per cent. on the tax and penalty. *Id.*

COSTS AGAINST GARNISHEE NOT A "TAX, IMPOST OR FINE" (See Costs, 1.) 103.

ATTORNEY-GENERAL—CONTROL OF TAX SUITS. (See Attorney-general, 1.) 203.

TAX ON FOREIGN INSURANCE COMPANIES IS CONSTITUTIONAL. (See Constitution, 1.) 424.

TERM OF COURT.

JURISDICTION ON MOTION TO SET ASIDE JUDGMENT—LAPSE OF TERM. (See Jurisdiction, 1.) 268.

TITLE.

1. TO PROPERTY.—The declaration of a party while in the possession of personal property that it belonged to him, and it being marked in his name, furnished some evidence in proof of his title. *Hanson v. Chiatovich*, 395.

WHEN TITLE TO LAND IS IMMATERIAL. (See Trover, 1.) 44.

WHEN NOT AFFECTED BY DECLARATIONS OF ASSIGNEE OF A CONTRACT. (See Declarations, 1.) 45.

TITLE TO LAND—RIGHT OF WAY. (See Railroads, 1.) 92.

CUSTOM AS TO POSSESSORY TITLE NOT ADMISSIBLE. (See Custom, 1.) 399.

TOWN SITE.

SUFFICIENCY OF DEED FROM TRUSTEE. (See Deed, 1.) 514.

TRESPASS.

COMPLAINT CONSTRUED—DAMAGES—EXTRACTING ORE FROM MINES. (See Mining Claims, 1.) 157.

TRIAL

See CRIMINAL LAW.

TROVER.

1. ACTION OF TROVER.—In an action of trover to recover the value of wood cut by defendants, under a contract with plaintiffs, upon land to which the plaintiffs claim possessory title: *Held*, that the defendants could not defeat a recovery by showing the title to be in the government of the United States, unless he connects himself with the government title. *Ward v. Carson River Wood Co.*, 44.
2. IDEM—WHEN DEMAND NOT NECESSARY.—When there has been an actual conversion of personal property, no demand is necessary, in order to sustain the action of trover. *Id.* 45.
3. IDEM—CONVERSION.—The taking of personal property under an invalid sale, with the intent to convert it to one's own use, amounts to a conversion, and the true owner of the property can recover its value in an action of trover, without making any demand, notwithstanding the fact that the purchaser purchased the property in good faith, believing his title to be valid. *Id.*
4. IDEM—LIABILITY OF BAILEE.—A. was the owner of wood in Alpine county, California. It was there wrongfully taken by B. and C., claiming it as their own. It was delivered in the Carson river to D., as a bailee for B. and C., and transported to Empire City, Nevada, at the expense of B. and C., and was there sold to E., where a demand for the wood was made by A. of the bailee, and refused. *Held*, that the conversion took place in Alpine county, California; that the refusal of the bailee to deliver the wood when demanded, did not amount to a new conversion; that by the refusal, the bailee became liable to the same extent that B. and C. and E. were liable, and no more, and that they were only liable for the value of the wood at the place of conversion. *Id.*
5. IDEM—MEASURE OF DAMAGES.—There being nothing in this case calling for special or exemplary damages: *Held*, that the plaintiff was entitled to recover the value of the wood at the time of the conversion, with legal interest from that date up to judgment. *Id.*
6. IDEM—FORM OF VERDICT.—The jury, in an action of trover, found a verdict in favor of plaintiff "for the possession of the personal property described in the complaint, and if a return thereof cannot be had, then," etc. The court, in entering judgment, followed the language quoted: *Held*, that the pleadings did not authorize such a finding; that this part of the verdict was mere surplusage, and that it ought to have been disregarded in entering judgment, and that the judgment should be modified. *Swan v. Smith*, 257.

COMPLAINT CONSTRUED—DAMAGES EXTRACTING ORE FROM MINES. (See Mining Claims, 1.) 157.

TRUST AND TRUSTEE.

SUFFICIENCY OF DEED FROM TOWN-SITE TRUSTEE. (See Deed, 1.) 514.

UNDERTAKING ON APPEAL.

FORM OF. (See Appeal, 2.) 203.

EXECUTED ON SUNDAY, VALID. (See Appeal, 3.) 203.

UNDERTAKING ON ATTACHMENT.

UNDERTAKING TO PREVENT LEVY OF ATTACHMENT. (See Attachment, 1.) 296.

VENDOR AND VENDEE.

KNOWLEDGE OF FRAUDULENT INTENT IN SALE OF PERSONAL PROPERTY. (See Sale, 3, 4.) 287.

RIGHT OF STOPPAGE IN TRANSITU. (See Stoppage in Transitu, 1-4.) 376.

VENUE.

CRIME COMMITTED IN ONE COUNTY WHEN ONE OF DEFENDANTS IS IN ANOTHER COUNTY. (See Criminal Law, 9-11.) 386.

VERDICT.

AGAINST EVIDENCE. (See New Trial, 1.) 107.

WHEN WILL NOT BE SET ASIDE. (See Instructions, 2.) 107.

FORM OF, IN ACTION OF TROVER. (See Trover, 6.) 257.

CONFLICT OF EVIDENCE. (See Evidence, 1.) 427.

SUSTAINED BY THE EVIDENCE. (See Water Rights, 5.) 431.

WAIVER.

MOTION TO SET ASIDE INDICTMENT MUST BE MADE BEFORE DEMURRER OR PLEA. (See Indictment, 2.) 386.

OF OBJECTIONS TO FORM OF PLEADINGS. (See Pleadings, 7.) 492.

WARDEN STATE PRISON.

AUTHORIZED TO EMPLOY PHYSICIAN. (See Statutes, 1.) 418.

WATER RIGHTS.

1. DIVERSION OF WATER.—In actions for the wrongful diversion of water the court is authorized to enter a decree in favor of plaintiff for the water, and to tax the costs of the action against the defendant, irrespective of the amount of the judgment for damages. *Brown v. Ashley*, 251.
2. BOUNDARIES OF LAND.—The water-course, and not the meander line by which it is surveyed, is the boundary of the fractional subdivision of land. *Shoemaker v. Hatch*, 261.
3. IDEM—ISLAND, WHEN PART OF THE LAND.—To determine the question of fact, whether a bar or island is part of the land upon either side of the stream, the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course, between the meander line and the main channel, must all be taken into account. *Id.*
4. DAMAGES FOR RIGHT OF WAY.—Under the act of congress of July 26, 1866, the defendant had the right to construct his ditch across the public lands of the United States, and could not be held responsible in damages for the digging of the ditch, to any party who came into possession of said land after the ditch had been completed. *Id.*

5. INJURIES CAUSED BY THE BREAKING OF A DITCH.—The facts of the case reviewed at length: *Held*, that the evidence supported a verdict in favor of plaintiffs. *Burbank v. West Walker R. D. Co.*, 431.
6. *IDEM*.—*Held*, that the defendant was bound to provide against such floods as had occurred within his knowledge. *Id.*
7. *IDEM*—CONTRIBUTORY NEGLIGENCE.—The plaintiffs were stockholders and officers of the corporation defendant; as such they frequently urged upon the trustees the necessity of fluming the west fork of Desert creek to prevent the injury which occurred; when overruled, they offered to do the work themselves, and were threatened with personal violence: *Held*, that they were not guilty of contributory negligence. *Id.*
8. PLEADINGS.—Where the damages were not claimed on account of the mere existence of the ditch, but were claimed on account of the careless management of the ditch and neglect of defendant to provide proper means of discharging the waters of the west fork of Desert creek into their natural channel in case of flood: *Held*, that neither the pleadings nor the evidence entitled the defendant to raise the question of prescription. *Id.*

WITNESS.

1. CREDIBILITY OF WITNESS.—A witness, upon cross-examination, may be asked concerning his past life, as to whether he has ever been in the state prison, and if so, for what offense, for the purpose of affecting his credibility as a witness. *Wicks v. Lippman*, 500.
- WHEN ALLOWED TO GIVE HIS REASONS FOR FILING A COMPLAINT IN A CRIMINAL ACTION. (See Criminal Law, 5.) 17.
- SURVIVING PARTNER NOT THE REPRESENTATIVE OF A DECEASED PERSON. (See Practice Act, 1.) 284.
- COMPETENCY OF WITNESS. (See Practice Act, 2, 4, 5.) 284, 356.
- PERJURY OF WITNESS. (See Instructions, 6.) 330.

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